

No. 50

JOSEPH SHEPHERD PETERSON

MINNEAPOLIS AND HAWAIIAN ISLANDS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 80

JOSEPH SHERMAN, PETITIONER,

vs.

IMMIGRATION AND NATURALIZATION SERVICE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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[fol. 1]

**BEFORE THE
IMMIGRATION AND NATURALIZATION SERVICE
UNITED STATES DEPARTMENT OF JUSTICE**

ORDER TO SHOW CAUSE AND NOTICE OF HEARING—

Dated March 14, 1963

In Deportation Proceedings under Section 242 of the
Immigration and Nationality Act

United States of America:

In the Matter of SHERMAN, JOSEPH aliases JOE SHERMAN;
CHOIMA SZORMAN; CHAYEM JOSEF SHERMAN; SAMUAL
LEVINE or SAMUEL or SAM LEVINE, Respondent.

File No. A-2478171

To: Joseph Sherman, 2411 East 3 Street, Brooklyn, New
York.

Upon inquiry conducted by the Immigration and
Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Poland and a citizen of Poland;
3. You last entered the United States at New York, New
York on or about December 20, 1938;
4. You then claimed to be a citizen of the United States.
5. You were not then inspected as an alien by an officer
of the United States Immigration and Naturaliza-
tion Service.

And on the basis of the foregoing allegations, it is charged
that you are subject to deportation pursuant to the follow-
ing provision(s) of law:

Section 241(a)(2) of the Immigration and Nationality
Act, in that, you entered the United States without in-
spection.

Wherefore, You Are Ordered to appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at 20 West Broadway, New York City; 14 floor; on April 5, 1963 at 8:45 AM, and show cause why you should not be deported from the United States on the charge(s) set forth above.

Immigration and Naturalization Service, I. W. Wroblenski, Assistant District Director for Investigations, New York, New York.

Dated: March 14, 1963
[fol. 2]

Notice to Respondent

The Copy of This Order Served Upon You Is Evidence of Your Alien Registration While You Are Under Deportation Proceedings. The Law Requires That It Be Carried With You at All Times

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

When you appear you may, if you wish, admit that the allegations contained in the Order to Show Cause are true and that you are deportable from the United States on the charges set forth therein. Such admission may constitute a waiver of any further hearing as to your deportability. If you do not admit that the allegations and charges are true, you will be given reasonable opportunity to present evidence on your own behalf, to examine the Government's

evidence, and to cross-examine any witnesses presented by the Government.

You may apply at the hearing for voluntary departure in lieu of deportation. Moreover, if you appear to be eligible to acquire lawful permanent resident status the special inquiry officer will explain this to you at the hearing and give you an opportunity to apply.

You will be asked during the hearing to select a country to which you choose to be deported in the event that your deportation is required by law. The special inquiry officer will also notify you concerning any other country or countries to which your deportation may be directed pursuant to law; and, upon receipt of this information, you will have an opportunity to apply during the hearing for temporary withholding of deportation if you believe you would be subject to physical persecution in any such country.

Failure to attend the hearing at the time and place designated hereon may result in your arrest and detention by the Immigration and Naturalization Service without further notice, or in a determination being made by the special inquiry officer in your absence.

Request for Prompt Hearing

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

(signature of respondent)

(date)

Before:

(signature and title of witnessing officer)

Certificate of Service

This order and notice were served by me on March 15, 1963 in the following manner:

by personal service (English) language on Joseph Sherman at 189-14 Linden Boulevard, Queens, N. Y.

Sidney E. Mason, Investigator.

[fol. 3]

BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE

UNITED STATES DEPARTMENT OF JUSTICE

File A-2 478 171—New York, N. Y.

**Transcript of Hearing in Deportation Proceedings—
April 5, 1963**

**MATTER OF JOSEPH SHERMAN also known as: CHOIMA SZOR-
MAN, CHAYEM JOSEF SHERMAN, SAMUEL LEVINE, Respon-
dent.**

Before Special Inquiry Officer Edward P. Emanuel.

[fol. 4] Special Inquiry Officer to Witness:

Q. What is your full name, please?

A. My name is Samuel Rubinsky.

[fol. 5] Miss Binder to Witness:

Q. Now, Mr. Rubinsky, you are here today because a subpoena was served upon you by the Government requiring you to appear today. Is that right?

A. Yes; that's right.

Q. Where do you live, Mr. Rubinsky?

A. I live at 209 Snediker Avenue, Brooklyn.

Q. And how long have you lived at that address?

A. 39 years.

[fol. 6] Q. Do you know the gentleman sitting opposite me?

A. I know him.

Special Inquiry Officer: The Trial Attorney pointed to the respondent in making her inquiry.

Miss Binder to Witness:

Q. How long do you know him, Mr. Rubinsky?

A. I cannot remember exactly.

Q. Did you ever help this man get a passport?

A. I didn't know for what I helped him. I don't remember.

Q. Did you go with him in June of 1937 to a government office where he made an application for a United States passport?

A. I went with him but I didn't know for what.

Q. Did he ask you to go with him?

A. He asked me—Yes, ma'am.

Q. And when he asked you what did he tell you?

A. I don't remember and I don't—I cannot recollect what . . .

Q. When you went with him—did you say you went with him to a government office?

A. Yes.

Q. And what took place when you went with him to the government office?

A. I cannot understand this question.

Q. You say that you went with this gentleman, the respondent, to a government office in 1937. Is that right?

A. That's right.

Q. Did he ask you to go with him?

A. Yes.

[fol. 7] Q. And when he asked you to go with him, do you recall what he asked you?

A. To sign a paper.

Q. Did he tell you why he wanted you to sign a paper?

A. I don't remember.

Q. And you went with him?

A. Yes.

Q. Do you know where you went with him?

A. I don't know.

Q. But you did go to some government office?

A. Yes.

Q. When you went to that government office, what did you do there?

A. When they asked me to sign my name, I signed it.

Q. Did this gentleman sign his name also while you were there?

A. This I don't know—I don't know. I know that I signed it—my name. But I don't know if he signed it.

Q. Did he ask you to go with him to help him get a passport?

A. I don't remember this. He didn't say that.

Q. I show you now an application for a passport which is dated June 8th of 1937, and on the back of it appears a title "Affidavit of Identifying Witness." Now, below this title, there is a signature. Can you tell me whether this is your signature?

A. This is my signature.

Q. The name "Samuel Rubinsky" is your signature.

A. Correct.

Q. Now, the address written under that name, is that in your handwriting?

A. In my handwriting—Yes, ma'am.

[fol. 8] Q. And when you signed your name to this paper, were you asked to raise your right hand and swear that everything in it was true?

A. Yes, ma'am.

Q. And in this affidavit you swear that you have known the applicant personally for six years. Was that true at that time?

A. Was that true—true.

Q. Now, I ask you to look at the photograph on this application. Whose photograph is that?

A. This is Joe Sherman.

Q. And is it a photograph of the Joe Sherman who is here today?

A. Yes. The same.

Q. This is a photograph of him as he appeared in 1937?

A. Yes, ma'am.

Q. Now, Mr. Rubinski, did you see Joe Sherman sign this paper before you signed it?

A. I don't remember. I don't remember.

Q. In this affidavit you say that you know the applicant who executed the affidavit herein to be a citizen of the United States. Did you know whether Joe Sherman was a citizen?

A. I don't know and I didn't read it.

Q. Did you sign this paper before any government officer?

A. I don't understand what you ask me.

Q. When you signed this paper, you say that you raised your right hand—who asked you to raise your right hand?

A. The man by the desk.

Q. Did the man by the desk ask you any other question [fol. 9] when you signed this paper?

A. No, no.

Q. Did he ask you anything when you signed the paper?

A. I signed and that's all.

Q. Did he ask you how long you know Joe Sherman?

A. This what I stated—six years.

Q. Did he ask you how long you know Joe Sherman; or did he ask you how long you know this man; or did he ask you how long you know Samuel Levine?

A. He asked me how long I know this gentleman—this gentleman—Joe Sherman. And I said "Yes, I know him six years."

Q. And did you at that time know that Joe Sherman was claiming to be Sam Levine?

A. I don't know. This I don't know.

Special Inquiry Officer: In his second to the last answer, the witness pointed to the respondent when saying "Joe Sherman."

Miss Binder to Witness:

Q. Mr. Rubinsky, did you know where Joe Sherman lived at the time that you went with him to this government office in 1937?

A. No.

Q. Well, how did he happen to ask you to go with him?

A. Because I knew him.

Q. Where did you know him?

A. I decline to answer on the ground of the Fifth Amendment.

Q. You didn't know where he was living at that time?

A. No.

Q. And did he tell you why he wanted a passport?

[fol. 10] A. I decline to answer on the ground of the Fifth Amendment.

Q. Mr. Rubinsky, you are certain that this man who is sitting opposite me, the respondent in this proceeding, Joe Sherman, is the man who asked you to go with him to the Government office and for whom you signed this document?

A. Yes, ma'am.

Q. And you are certain that the photograph appearing on this document is the photograph of Joe Sherman as he appeared in 1937.

A. Yes, ma'am.

Miss Binder: Mr. Emanuel, at this time I ask that you receive in evidence the application form on which the witness has identified his signature, and has also identified the photograph of the respondent.

Mr. Gollobin: I object to its receipt in evidence as the testimony of the witness is definitely vague and unable to identify many relevant aspects . . . The testimony speaks for itself. I submit no adequate foundation has been laid for its receipt in evidence.

Special Inquiry Officer: Objection overruled. The document previously marked "6 for identification only" is received in evidence as an exhibit bearing that number.

Miss Binder to Witness:

Q. Mr. Rubinsky, in answer to the court order of 1959, did you appear at this office on March 25, 1959?

A. Yes, ma'am.

Q. And did you at that time make a statement under oath before an immigration officer?

A. Yes, ma'am.

[fol. 11] Q. And after you made that statement under oath were you permitted to read and sign the statement?

A. I signed—Yes, ma'am.

Q. And you read it?

A. I didn't read it because I don't read so well—I cannot read so well.

Q. Was it read to you?

A. It was read to me.

Q. And were you at that time accompanied by your attorney, Harry Sacher?

A. Yes, ma'am.

Q. And he signed the statement also?

A. Probably. Yes, yes.

Q. I show you now the record of sworn statement which was taken on March 25, 1959, together with a photograph attached to it, and a photostatic copy of an application for passport, the original of which is now in evidence, and ask you to tell me whether this signature—Samuel Rubinsky—on Page 4 of this statement is your signature.

A. This is my signature.

Special Inquiry Officer: The witness points to the signature, "Samuel Rubinsky" on Page 4 of the document.

Miss Binder: I offer the statement and the exhibits in evidence.

Mr. Gollobin: I object to its receipt in evidence as in no way binding on the respondent.

Special Inquiry Officer: Objection overruled.

The document is received as Exhibit 9.

Mr. Gollobin: Exception.

Special Inquiry Officer: It is not necessary, Mr. Gollobin, that you note your exceptions any time you feel aggrieved. You have an automatic exception.

Miss Binder to Witness:

Q. After you went with Mr. Sherman to this government office, did you see him again?

A. No.

Q. At any time after 1937 did you see Mr. Sherman?

A. No. Until I received the subpoena.

Q. Did you see Mr. Sherman after you received the subpoena?

A. When I received the subpoena, immediately I tried to get in touch with Mr. Sherman.

Q. And you did get in touch with him?

A. Sure.

Q. You informed him that you would be here today. Is that right?

A. Yes.

Q. Did he give you any information? Did he tell you what to say?

A. No.

Q. Well, what kind of a discussion did you have with Mr. Sherman when you notified him about the subpoena?

A. Discussion? We didn't have no discussion.

Q. What did you say to Mr. Sherman?

A. That I received a subpoena and I have to come today here.

Q. And what did he say to you?

A. "Well, the only thing what you have to say is to tell the truth, and that's all." And that's what I am telling.

Q. Mr. Rubinsky, on Page 3 of this statement which is [fol. 13] now Exhibit 9 in the record, you were asked how does it happen that you appeared to sign this application. And you answered: "Well, Joe Sherman asked me a favor—that I should sign for him an application for a passport, and that is all. I do not know Sam Levine and I do not know who is Sam Levine but I know Joseph Sherman, and he asked me a favor. I went to sign but I do not remember anything besides my signature."

A. This is the truth.

Q. Now, according to this answer then, Mr. Sherman asked you to sign for him an application for a passport, and you knew—didn't you—that you were signing for a passport?

A. It's more than 25 years and I cannot recollect and I cannot remember.

Q. Was—But was this statement true when you made it on March 25, 1959, before the immigration officer?

A. This what I said is true.

Special Inquiry Officer to Witness:

Q. Are you saying, Mr. Rubinsky, that this what you said on March 25, 1959, is true—is that what you are saying?

A. Yes, sir.

• • • • •

[fol. 14] Miss Binder to Witness:

Q. Mr. Rubinsky, I show you now passport 439406 which is Exhibit 7 for identification in this hearing, and call your attention to the photograph on Page 4. Will you tell me whose photograph that is.

A. This is Joe Sherman.

Q. And is that a picture of Joe Sherman as he appeared in 1937?

[fol. 15] A. Yes. This is the picture.

Special Inquiry Officer: Mr. Gollobin, do you have anything of the witness?

Mr. Gollobin: No.

Special Inquiry Officer: Very well then.

Thank you very much, Mr. Rubinsky. You are excused. You may leave the hearing room.

Miss Binder: Mr. Emanuel, at this time I ask that you receive in evidence the United States passport 439406 which was issued on the basis of the application which is now in evidence.

Mr. Gollobin: I object to its receipt in evidence as no adequate foundation has been laid at this time.

Special Inquiry Officer: Overruled. The document #7 for identification is received in evidence as Exhibit 7.

Miss Binder: At this time, Mr. Emanuel, I wish to offer in evidence a certificate of admission of alien showing the arrival of Samuel Levine at the port of New York on the

S.S. Ansonia on December 20, 1938. And in connection therewith I wish to submit a certified copy of the manifest of the arrival of that ship. I call your attention to the fact that the certificate of arrival is based upon the information appearing on Page 8, Line 26, of this manifest.

Mr. Gollobin: I strenuously object to the receipt at this time because there is absolutely nothing to connect this Samuel Levine with the respondent. A document is being offered in evidence relating to a Samuel Levine, and whether or not this in any way connects with the previous testimony in this case is entirely obscure. It would seem to me that the Government is trying, by sheer offer of a document without any foundation at all, to establish an [fol. 16] entire case.

Special Inquiry Officer: Overruled. Exhibit 10.

Mr. Gollobin: The Special Inquiry Officer—I have not observed the S.I.O. has even observed this document before making the ruling.

Special Inquiry Officer: The material has been identified to me in her offer. I am familiar from numerous other cases with similar documentation.

Mr. Gollobin: Well, I take very strong exception to the way this ruling has been made, in addition to the ruling itself because the point involved here is extremely material.

Special Inquiry Officer: I desire here and now recorded that after the testimony of Mr. Rubinsky, Exhibit 6 was received in evidence. I desire it further recorded that that exhibit, the application for a United States passport, shows that United States passport # 439406 was issued. That passport is now in evidence. That passport, the last witness stated, bears the photographic likeness of the respondent as of approximately a quarter century ago. That passport is endorsed by the Immigration and Naturalization Service to indicate that the person presenting that document had arrived in the United States December 20, 1938. With knowledge of the facts thus delineated, we made our original ruling with regard to Exhibit # 10.

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[fol. 17] Special Inquiry Officer to Respondent:

Q. May I see the back of your right hand, please?

A. —

Special Inquiry Officer: The respondent complies with the request. We observe that there is a scar on the back of his right hand. We also note that his eyes are blue; that his hair is blond; and that he is . . . When previously standing, we observed that he was approximately 5' 4". [fol. 18] All of which description is set forth in both the application for the passport, Exhibit 6, and the passport itself, Exhibit 7.

[fol. 19]

BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE

UNITED STATES DEPARTMENT OF JUSTICE

File A-2 478 171—New York, N. Y.

MATTER OF JOSEPH SHERMAN also known as: CHOIMA SZORMAN, CHAYEM JOSEF SHERMAN, SAMUEL LEVINE, Respondent.

Transcript of Hearing in Deportation Proceedings—
February 25, 1964

Before Special Inquiry Officer Edward P. Emanuel

[fol. 20]

COLLOQUY RE INTRODUCTION OF EXHIBITS

Miss Binder: Mr. Emanuel, at this time the Service wishes to introduce in evidence a certified copy of a manifest record of the S.S. Aquitania which arrived in Cherbourg, France, on June 22, 1937. It has been certified to before the consul, and bears the name of Samuel Levine as a passenger on that vessel.

Special Inquiry Officer: Show it to the attorney, please.

Mr. Gollobin: I object to its introduction in evidence on the following grounds: No foundation has been laid, and since the Trial Attorney is not herself a witness, I would insist that some person be brought to identify this, who was properly the custodian of this document. It doesn't even come from an American source as such. It comes from, on its face, purportedly a French source, and in time was [fol. 21] passed on by an American source. There is no—I submit there is no basis that might possibly, if this were an American document, and the principle of the custodian of an American record, be entitled to introduction into evidence. There is no such foundation laid here, and there is no witness produced.

Special Inquiry Officer: Miss Binder, do you wish to . . .

Miss Binder: Yes. I wish to call Counsel's attention to the certification on the back of it, certified to by the American consul in France—in Paris, France. With regard to the person who signed this document, and the fact that this was obtained through official sources, is shown by the memoranda which are attached.

Mr. Gollobin: I don't think that obviates the necessity for producing a person under such circumstances. You should consider the statement purely self-serving and not in any way curing the defect in foundation; that is to say, defect in foundation of proof.

Special Inquiry Officer: Miss Binder, there's material on the proffered documentation in a foreign language—in the French language. Is it contemplated that we will be favored with the translation of that?

Miss Binder: Yes, sir. The Service will request a translation of the French material on the document.

Mr. Gollobin: Might I see the portion that's in French on the reverse side?

Special Inquiry Officer: Well, it is both, Mr. Gollobin, on the reverse side and on the left and right portion of the front side of the Cunard document.

Here is all of the material.

Mr. Gollobin: I note that the certification that the Trial Attorney has referred to is simply to the authority of the custodian officer, and therefore in no way reaches the authenticity of a foreign document, which is, as far as I [fol. 22] understand, not entitled to any principle that would apply to the person or custodian in the regular course of an American document.

Special Inquiry Officer: With the understanding that we will be furnished a certified translation of the foreign portion of the document, the objection is overruled. The document is received in evidence as Exhibit 15.

Miss Binder: At this time I wish to introduce in evidence a certified copy of a record from the Department of State in Washington, D. C., submitting a list of American citizens who arrived in Cherbourg during the period January 1, 1937 to September 30, 1937. And I call your attention to the list of such persons who arrived on the S.S. Aquitania at Cherbourg, on June 22, 1937; particularly, the name listed: Samuel Levine, 27, salesman.

Mr. Gollobin: I object to the reception of this document in evidence. It purports to be a document dated in 1937, in which the American Vice Consul in Cherbourg, France, has ascertained the name of an American citizen, suspected of being en route to Spain to join the Loyalist Forces. The basis of the consul's—vice consul's information as to the records of arrival in a French port and the source of his information are absolutely not disclosed, and do not appear on the face of this record. And it would actually have to be a certification of French records rather than American records. If the Service wishes to have this document in evidence, I submit they have to submit somebody who can vouch for the original authenticity of the document, and at the very least submit the officer who compiled this list so he can be cross-examined as to the source of his information, and the basis of its authenticity.

Special Inquiry Officer: Objection overruled. Exhibit 16. [fol. 23] Miss Binder: At this time the Service wishes to introduce in evidence another document, certified by the State Department from the General Records of the Department of State, in which is a telegram received from Barcelona via Paris, dated December 3, 1938, with regard to passports which have been endorsed in all cases or where applications for certificates were made, and I call your attention to No. 245 on this document, which relates to one Sam Levine, passport #439406, dated June 10, 1937.

Mr. Gollobin: I object to its receipt in evidence as there is no foundation laid relating the document to the respondent.

Special Inquiry Officer: Well, do you wish to have your client respond to questions as to whether he is the person referred to herein under the name stated. It is my recollection that previously he had declined to answer interrogations regarding that.

Mr. Gollobin: It's my understanding that the Service has the burden of proof in this matter, since this is an expulsion proceeding.

Special Inquiry Officer: I presume that by your response, your answer is in the negative. Is that correct?

Mr. Gollobin: At this time it is in the negative. And my objection is predicated on the Service's burden of proof.

Special Inquiry Officer: Objection overruled. Exhibit 17.

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[fol. 24] Miss Binder: Mr. Emanuel, at this time, I wish to offer in evidence a certified document from the General Records of the Department of State, which is dated December 10, 1938, consisting of a telegram listing the names of volunteers from Spain who sailed on the Ausonia on that date, together with a report indicating that the persons were examined on December 20, 1938, upon arrival of the vessel in the United States. And I call your attention to the fact that amongst those listed is Samuel Levine.

Mr. Gollobin: I object to its reception in evidence on the ground that no foundation has been laid in relating

this document to the respondent; nor is any custodian of the original document offered for cross-examination, since it purports on its face to say that the persons listed were met with on their arrival, and they obviously would be preferred witnesses in connection with any identification now alleged to be made in relating a particular individual listed on that document as being one and the same as the respondent. Nor is there any reason given for the non-production or non-availability of the persons mentioned in that document who allegedly met the individuals listed on their return to the United States.

Special Inquiry Officer: Objection overruled. Exhibit 18. [fol. 25] Miss Binder: Mr. Emanuel, the Service has a witness to present at this time.

Special Inquiry Officer to Witness:

Q. Sit down now and tell me your name, please.

A. Edward Morrow.

Miss Binder to Witness:

Q. Mr. Morrow, are you a citizen of the United States?

A. I am.

Q. Have you ever used or been known by any name other than Edward Morrow?

A. Yes. I was known as Edward Mroczkowski.

Q. Mr. Morrow, did you serve in the war in Spain sometime between 1937 and 1939?

A. I did.

Q. Do you recall when you left the United States?

A. About June '37.

Q. And when did you return to the United States?

A. December '38.

Q. And where in Spain did you serve?

A. First of all, we had training in a town near Albacete, and from there we went—I was put into the Mackenzie Papineau Battalion of the Abraham Lincoln Brigade. Then

we went up to Quinto. From there we shifted about on the front in Catalonia—I never got into battle there. Then we [fol. 26] went down to Teruel. And then to the first battle of the Ebro. And then, after being wounded, I spent four months at a hospital in Mataro, working there.

Q. Mr. Morrow, do you recognize the person sitting opposite me?

A. I do.

Q. Do you know his name?

A. Well, yes—now—Sam Levine.

Special Inquiry Officer: The person seated opposite the Trial Attorney is the respondent.

Mr. Gollobin: I'm going to object for the record that it was quite improper for the Trial Attorney to, in such a leading way, designate the respondent. She could have simply asked does he recognize anybody in this room.

Special Inquiry Officer: The belated objection is overruled.

Miss Binder to Witness:

Q. Mr. Morrow, can you tell me where you know this person from?

A. From various places around Spain.

Q. Do you recall in what places in Spain you saw him?

A. With pinpoint accuracy—No.

Q. Do you know what he was doing in Spain?

A. I recall he was in the Transportation Corps. He was driving an ambulance, I think, or in transportation . . . he was a driver.

Q. Do you recall any personal contact with him in Spain?

A. No. He was around but I do not recall any personal contact with him.

Q. Do you know over how long a period he was in Spain?

A. Definitely? No.

Q. Can you tell me anything about any particular time [fol. 27] that you may have seen him in Spain?

A. No. This was many, many years ago. I certainly cannot pinpoint any of that—No.

Q. Do you know whether this man traveled to Spain with you?

A. No.

Q. Do you know whether he returned from Spain with you?

A. I'm quite sure he was on the Ausonia with me.

Q. And where did you board the Ausonia?

A. I think it was Havre.

Q. Le Havre, France?

A. Yes.

Q. And was that on or about December 10 . . .

Mr. Gollobin: I object to any leading of the witness.

Miss Binder: Sorry.

Miss Binder to Witness:

Q. Can you tell me about when you boarded the Ausonia?

A. Well, it must have been December '38—it must have been in December of '38.

Q. Incidentally, Mr. Morrow, did you have a passport—a United States passport when you went to Spain?

A. I did.

Q. Did you have to have that passport renewed when you returned to the United States?

A. As a matter of fact, I think I came back without a passport. Some special facilities were made for us at that time.

Q. Do you recall when it was that you arrived in the United States?

[fol. 28] A. Yes. Sometime just before Christmas—around Christmas time, of '38.

Q. Do you recall the names of any other persons who returned to the United States with you at that time?

A. Yes. Victor Tiship (phonetic), Mike Calcagno (phonetic). I can think of their faces, but I can't recall their names.

I'm sorry—Calcagno did not come back with me.

Q. Do you recall any others who may have come back with you?

A. No; not by name.

Q. I show you now what is Exhibit 18 in this record and ask you whether the name Edward Mroczkowski is your name, as listed on page 2 of this document?

A. Yes.

Q. Mr. Morrow, I show you now what is Exhibit 16 in this case, and on page 5 I refer you to the name Edward Mroczkowski, 21, student, listed under the S.S. Aquitania, which arrived in Cherbourg on June 22, 1937. Are you the person referred to?

A. Yes.

Miss Binder: I have no further questions of the witness.

Special Inquiry Officer to Witness:

Q. Mr. Morrow, you say you had known this gentleman over here—the respondent in this case, around Spain. Over what period of time was that, please? Or in what year or years, if you remember?

A. '37—'38, I would say.

Special Inquiry Officer: Thank you.

Mr. Gollobin, you may proceed.

Mr. Gollobin: I ask for a recess—a couple of moments.

Special Inquiry Officer: Recess.

[fol. 29] Mr. Gollobin to Witness:

Q. Where were you born, Mr. Morrow?

A. Jersey.

Q. When?

A. August 16, 1915.

Q. When was your name changed?

A. 1941.

Q. Was this done legally?

A. It was.

Q. Where?

A. Hicksville, New York.

Q. By court order?

A. Yes.

Q. What date in 1941?

A. I don't know. I would have to look that up. It was around May or June.

Q. Can you state the reason why you had your name changed?

Miss Binder: I object to that as being immaterial.

Special Inquiry Officer: Overruled.

Witness: Yes. Mroczkowski is a very difficult name. I tried to get jobs after I finished college with the name Mroczkowski and I tried with the name Morrow—the same identical letters, and the letters from Morrow were answered. I discussed it with my father; my father thought it might be a good idea.

Mr. Gollobin to Witness:

Q. Were you ever arrested?

A. No.

[fol. 30] Q. Have you testified previously before this Service?

A. No.

Q. This is the first time?

A. Yes.

Q. Have you ever appeared before any other government agency?

A. No.

Q. When was the first time you spoke to a representative of the Service?

A. About four months ago.

Q. Do you know on what basis they contacted you?

A. No. I was contacted in the office by Mr. Mason. He said he would like to see me.

Q. Did Mr. Mason identify himself?

A. He did.

Q. And what was his identification?

A. Immigration Service, United States.

Q. Had you ever before that spoken to a representative of the Service?

A. No.

Q. Had you ever before that spoken to a representative of the Federal Bureau of Investigation?

A. No.

Q. Now, at the time they spoke to you, was this at their office or in your home?

A. My office at the Times.

Q. And how long was the conversation?

A. Oh, about forty minutes.

Q. And where was that address where this conversation took place?

[fol. 31] A. 229 West 43 Street.

Q. New York City?

A. Yes.

Q. Is this where you are working?

A. Yes.

Q. What is the name of your employer?

A. The New York Times.

Q. And what is the nature of your work there?

A. I am a reporter.

Q. Since when?

A. Since 1943.

Q. Continuously to now?

A. No. I had a year and a half out for service in the United States Army.

Q. And then you returned to the Times as a reporter?

A. Right.

Q. Now, can you give me Mr. Mason's first name?

A. I'm not positive. I think it's Stanley.

Q. Now, who else was present at the time he questioned you?

A. No one.

Q. Now, just what did he ask you?

A. He asked me whether I was the Edward Mroczkowski who had gone to Spain in 1937, and had I ever lived in Hicksville, and I said Yes. And otherwise developed my history.

Q. Now, were you surprised to know that he knew that you had been in Spain?

A. No.

Q. You were not?

[fol. 32] A. No.

Q. On what basis did you assume that he would know about this?

A. I think I've been examined and re-examined—my history—by many services.

Q. What services do you mean?

A. Well, when I got my Department of Defense card as a foreign correspondent with the Times, I know I had to be cleared.

Q. When was this?

A. This was 1946.

Q. And you stated at that time you had been in Spain?

A. I wasn't questioned by anyone. But everybody knew that. I had never hidden the fact that I had been in Spain.

Q. Who knew it?

A. Well, my employers knew it; my family knew it; everybody around me knew it. I have been proud of the fact that I was in Spain.

Q. And you're proud to be here today?

A. I am doing my duty, I think, as a citizen.

Q. You're proud to be here today?

A. Yes.

Miss Binder: I object . . .

Special Inquiry Officer: Overruled.

Witness: Yes. As a citizen.

Mr. Gollobin to Witness:

Q. Did Mr. Mason take notes while you were talking to him?

A. Yes.

Q. This was during this forty-minute conversation?

[fol. 33] A. Right.

Q. He asked you various questions and then he would at various times take notes on your answers?

A. Right.

Q. Now, did he ask you when you left the country?

A. He did.

Q. And when did you say you left?

A. I thought it was around June or July—June, I think it was, of 1937.

Q. And when did you say you returned?

A. In December of '38.

Q. Did he ask you how you came to go to Spain?

A. I don't think so—No.

Q. Did he ask you what document you had when you left?

A. Yes.

Q. And what did you say?

A. A United States passport.

Q. And to what country was this passport made out to go to?

A. France.

Q. And did he ask you whether you had made a misrepresentation in securing the passport to go to France, when evidently you intended to go also to Spain?

A. No. He did not. Not that I recall.

Q. Did you understand that it was illegal at that time to use a passport made out for France for entry into Spain?

A. I did.

Q. Are you proud of that?

[fol. 34] A. Yes.

Q. You considered that was doing your duty as a citizen?

A. At that time, I did—Yes.

Q. Do you recall other questions Mr. Mason asked you?

A. No.

Q. But you were in there forty minutes?

A. Yes. He showed me some photos then and asked me whether I could identify them.

Q. How many photos were you shown?

A. I think there were two.

Q. Do you recall who the photos were of? Could you identify them?

A. He asked me whether I could identify them as Mr. Sherman.

Q. And what was your answer?

A. No. I could not identify them as Mr. Sherman.

Q. And who was the other photograph?

A. They both were the same person.

Q. And what other questions were you asked?

A. He then asked me whether the name Levine meant anything to me?

Q. What was your answer?

A. I said that rang a bell.

Q. What was the bell it rang?

A. In my mind the name Levine was somewhat like the type of fellow on this photograph.

Q. You didn't recognize the photograph, but you recognized the name?

A. No. I didn't recognize the name. I said there is something familiar about his face; but it's not Joe Sherman, or [fol. 35] whatever the name he used. I don't recall any Sherman like that—it could be Levine—Yes, that rings a bell.

Q. That you could recall?

A. Yes.

Q. And yet you had no contact with Mr. Levine in Spain or the person you knew—or were being told went to Spain under the name of Levine—did you?

Miss Binder: I object to that. There's been no testimony that he was told that this person went to Spain.

Special Inquiry Officer: Overruled.

The last unanswered question is played back from the electronic recording.

Witness: No. I had not had any contact with Mr. Levine since Spain.

Mr. Gollobin to Witness:

Q. That wasn't my question, Mr. Morrow. The fact was you testified that you had no contact with him in Spain.

A. I don't recall direct contact with Mr. Levine in Spain—No.

Q. Now, can you recall any other things you were asked by Mr. Mason?

A. He asked me whether I would be willing to come down to this building and see whether I could identify the man in person.

Q. And you felt you would be proud to do that?

Miss Binder: I object to this as harassment of the witness.

Special Inquiry Officer: Overruled.

Witness: It's not a question of pride; it's a question of duty, too.

Mr. Gollobin to Witness:

Q. Aren't they one and the same? Aren't you proud to [fol. 36] be doing your duty? And wouldn't doing what you consider your duty be something you'd be proud to do?

Miss Binder: I object to this as argumentative, Mr. Emanuel.

Special Inquiry Officer: Sustained.

Mr. Gollobin to Witness:

Q. Now, was there anything else you were asked by Mr. Mason?

A. That is all.

[fol. 37] Q. Have you been a member of the Abraham Lincoln Brigade—a veteran of the Abraham Lincoln Brigade organization in this country?

A. I was for a short period—Yes.

Q. When was that?

A. From when I came back from Spain—I think about—I was a member from about 18 months to two years.

Q. Tell me why you say you are proud of having been in Spain—why?

A. Because I thought we were fighting Fascism at that time.

Q. You still think so?

A. Yes.

[fol. 38] Q. And you believe in fighting Fascism—is that what I gather from your remark?

A. You gather correctly.

Q. And if something were involved, which didn't involve fighting Fascism, but on the contrary helping Fascism, you would be opposed to it?

A. Yes.

Q. Now, you stated you were in the Mackenzie Papineau Battalion.

A. That's right.

Q. Now, will you please tell me how the various brigades or battalions that involved Canadians or Americans and so on were set up in relationship to each other? How many battalions were there?

A. Well, I just recall the Abraham Lincoln, Mackenzie Paps. There were other brigades—11th, 12th, 13th. I just recall these two in the 15th Brigade.

Q. Now, who was the head of your battalion?

A. It was a long time—Robert Thompson.

Q. He's the only one?

A. He's the only one I recall. They had a Political Commissar whose name was Joe Dalet.

Q. What was the setup—were there battalions and a brigade, or how was this arranged?

A. There were battalions within a brigade.

Q. And how many battalions were there?

A. I don't know.

Q. Now, what service did you serve in the Mackenzie Papineau Battalion?

A. I was with the medical group.

[fol. 39] Q. Throughout the time you were there?

A. Yes.

Q. You were not in the infantry, artillery or any combat unit?

A. No.

Q. Now, in the medical unit what did you do?

A. First of all, you try to take care of whatever illnesses there were among the men. You inoculate people.

Q. I mean—were you in a hospital—just where were you?

A. I was—well, for the first eight months, moving around with the unit. Wherever it was, we moved with the unit; we went into battle with them.

Q. Did you, more or less, give emergency first aid? Is that what you mean you performed?

A. That's right. We also went out on the field to get bodies of men and bring them back. We weren't in a hospital; we moved with the unit in connection with its casualties.

Q. And this was throughout the time you were in Spain?

A. The first nine months.

Q. And after that?

A. And then I had a leg wound, and then I was sent to the hospital, and then I was attached to Dr. . . .

Q. Before you go any further—you had a leg wound?

A. Yes.

Q. And you were sent to a hospital?

A. Right.

Q. Where were you sent?

A. I know I ended up in Mataro, to a field hospital, but [fol. 40] I don't recall where it was.

Q. And how long were you in the hospital?

A. I stayed there for the rest of my time in Spain.

Q. How long was that?

A. Another seven or eight months.

Q. Fix the date, please.

A. I can't do that. It was 25 years ago.

Q. You can't fix the date of your own . . . hospital, but you can remember this person that you knew as Samuel Levine being Joe Sherman?

A. I didn't say . . .

Miss Binder: That's not his testimony. I object to that.

Witness: I didn't say that at all.

Special Inquiry Officer: Overruled.

The question was answered simultaneously with the objection.

Mr. Gollobin to Witness:

Q. After you got out of the hospital, what happened? Did you return to the United States?

A. Well, I was returned to the front, and then we were sent back to Barcelona for repatriation to the United States.

Q. How long after you got out of the hospital was that?

A. Oh, I'd say about six weeks.

Q. So you practically went from the hospital—home?

A. Yes.

Q. How many other persons were there on the vessel coming home?

A. Quite a number.

Q. Well, how many would you say?

[fol. 41] A. That I knew personally? About 40.

Q. Well, my question was how many were there on the vessel that brought you home?

A. The vessel was a big vessel—I imagine its passengers—about 300 or 400.

Q. And were there, in your opinion, about that number aboard?

A. I guess so—Yes.

Q. Where were you in that vessel?

A. In a cabin; third class.

Q. And the various other portions of the vessel were occupied—the different quarters of the vessel, by different persons coming back from Spain. Is that right?

A. Yes. Quite a number were—Yes.

Q. Were all the passengers on that vessel, those, like yourself, coming from Spain?

A. That I do not know.

Q. In connection with a person you say you knew as Samuel Levine there, were you introduced to him?

A. I think so—Yes.

Q. When do you think so?

Miss Binder: I don't understand the question. May we have a clarification?

Mr. Gollobin: I think the witness hasn't asked for it, and I think he is answering the question.

Witness: In a group of men, you get to know everybody. And he was in the group—Yes.

Mr. Gollobin to Witness:

[fol. 42] Q. Now, was he in your battalion?

A. I think when we were training—Yes.

Q. Where were you training?

A. North of Albacete.

Q. Aren't you inventing that? You didn't mention that before—did you, Mr. Morrow?

A. What?

Q. In connection with training—when you were asked by the Government Trial Attorney about knowing him. You said you met him in connection with his being in the transportation corps.

A. Yes. That's right.

Q. But now you're throwing in that you met him in training—or you think so. Do you know so?

A. I'll go so far as to say that now—Yes.

Q. Your memory is now being improved. Is that . . .

A. Under your questioning, definitely.

Q. I see. What else can you remember now that you haven't testified before, since you seem to say your memory is improving?

A. —

Miss Binder: I object to the question.

Special Inquiry Officer: Overruled.

Witness: You will have to ask me the questions.

Mr. Gollobin to Witness:

Q. Well, so far you can't think of anything else?

A. That's right.

Q. I'll try to see how much I can improve your memory:
[fol. 43] Now, where did you train?

A. At this town north of Albacete.

Q. Now, what was the name of the town?

A. I can't recall.

Q. How many men were training there?

A. There must have been at least 200.

Q. Were you all quartered in the same place?

A. No.

Q. Now, were you all being trained for the same thing?

A. No. Some of them were not being trained. Yes. At that town we were all being trained to become infantrymen.

Q. Now, you have testified that you understood that this gentleman here you claim you knew as Samuel Levine, you knew him in the Transportation Corps.

A. Yes. Later on . . . that's where I saw him . . .

Q. And yet all these people there who you met with were being trained in the infantry.

A. Well, I was being trained in the infantry; I didn't end up in the infantry.

Q. Was that because of your request?

A. No.

Q. Did you ever have any conversation with him there—this person you are identifying today?

A. I'm quite sure I had conversations with him at one time or another.

Q. Oh, you now remember that?

A. I'm quite sure I did.

Q. What does your quite sure mean? You either remember or you don't—don't you?

A. Right now, I'll say I don't know whether I had conversation with him.

Q. You recede from that?

A. Yes.

Q. How many men did you say were being trained there?—

A. Oh, I think about 200.

Q. Is that what you just said a moment ago—the number?

A. I don't know. I think so.

Q. A moment ago, I understood you to say there were about 400. In other words, between a moment ago and now, your memory improved from—reduced the number by a half.

Miss Binder: I object to that. That was not the testimony of the witness, Mr. Emanuel, as the record will reflect.

Special Inquiry Officer: Sustained.

Mr. Gollobin to Witness:

Q. Where were you trained? What was the name of the place?

A. I just told you some town north of Albacete.

Q. And how many men in general were being trained there?

A. 200, as I recall. Albacete was the headquarters of the International Brigade at that time, but I don't know how many men they had there.

Q. Now, what was the purpose of the Transportation Unit—what did they do?

A. Well, you have some attached to battalions who bring up food and other supplies; medical transportation boys who drove the ambulances.

Q. And what kind of transportation do you claim Mr. Levine, the person you know as Samuel Levine, was in?

A. I didn't claim. I just—I think he was in transportation, a segment of the brigade.

Q. You're not sure?

A. No.

Q. What kind of transportation you claim that this person you knew as Samuel Levine was in, since you testified there was more than one kind: delivery supplies, doing various other military duties.

A. My recollection of that is hazy, but I recall this person being around whenever there was some kind of delivery being made to the battalion.

Q. Now, there were many kinds of deliveries being made to the battalion. Isn't that right?

A. Yes.

Q. There is military supplies, food, hospital supplies, et cetera. Isn't that so?

[fol. 46] A. Yes.

Q. Were they all delivered by the same driver?

A. No.

Q. And yet you say he was around whenever there was a delivery being made?

A. Not whenever—always around. On occasions, I saw this gentleman when there was transport around.

Q. In other words, when—you just testified a moment ago that whenever deliveries were being made, you saw this gentleman around. Isn't that what you just said?

A. Sometimes deliveries were made and he wasn't around.

Q. So how many times was he around? Now, you say he wasn't around there all the time when deliveries were being made.

A. Just frequently enough to thrust himself upon my memory.

Q. Now, what time of the day were deliveries made?

A. Any time—day or night.

Q. Were wartime deliveries made during the day?

A. Sometimes; depending upon where you were.

Q. Well, wasn't there some provision made to deliver at night because of fear of bombardment by planes of the Franco forces?

A. I said depending upon where you were. If you were in the secondary lines, you didn't . . .

Q. I must say, Mr. Morrow, this has been written about in the public press, also in books, that in connection—I ask you: Is it not a fact that military deliveries to the forces in Spain were made at night?

A. They were sometimes made in the daytime.

Q. Was that the common practice?

[fol. 47] A. No.

Q. Wasn't that where in a case maybe there was an emergency situation they delivered during the day? And the general practice was to make deliveries at night because of military safety?

A. I would say—Yes.

Q. Now, you say, the deliveries therefore made during the day were the exceptional ones. Is that right?

A. That's right. Except when you were in secondary lines or back further.

Q. Well, were you in the secondary lines?

A. Yes. The Mackenzie Papaneaus weren't in action all the time.

Q. And in your secondary line, would you be getting military supplies, or would you simply be getting food?

A. You could be getting both because you sometimes were training and . . .

Q. So how long were you—I'm sorry. Continue.

A. . . . you had to get new weapons sometimes, and naturally there were military supplies coming in, too.

Q. And how long were you in the first line? For what period of time were you there?

A. Well, let's see. At Quinto about ten days. At Teruel about 32, or about a month. I think I was near Masdelasmatas another 25 or 30 days.

Q. And the rest of the time you were in the secondary line?

A. Yes. Or in the hospital.

Q. And how far behind the lines was the secondary line?

A. I wouldn't know.

Q. Were you ever bombed in the secondary line?

A. Yes.

[fol. 48] Q. So military precautions had to be taken in the secondary lines, too. Didn't they?

A. Yes. When planes were overhead.

Q. And there was the danger of bombing in the secondary line?

A. Yes.

Q. So wasn't the practice in delivering supplies to the second line pretty much as to the first line, since you faced military hazards in the secondary line from bombing, as well?

A. No.

Q. Now, you testified that supplies were delivered by different units of a transportation corps since you delivered different kinds of supplies: some were military for armaments, some were food, and so forth. Were these different drivers?

A. Yes.

Q. Now, how many times do you claim you saw Mr. Levine?

A. I don't know how many times I saw Mr. Levine.

Q. Could it be one time?

A. No. More than once.

Q. Was it ten times?

A. More than that, too.

Q. Was it twenty times?

A. At least.

Q. Well, how often were supplies delivered?

A. Not being a quartermaster, I don't know.

Q. Well, you were there—weren't you?

A. Yes. But sometimes I slept.

[fol. 49] Q. Well, I'll allow you for the time you slept. But for the time you were awake, which I assume was part of the time, how often were they delivered?

A. Depending if Solly Wellman (phonetic) could get his trucks through, he'd come up three times a day.

Q. The same supplies, or different supplies?

A. These were the food supplies I'm talking about now.

Q. What do you claim he was delivering?

A. I don't claim he was delivering anything. I just have the general impression and know that I met this man in Spain.

Special Inquiry Officer: Mr. Gollobin, when you say "he," do you mean the respondent?

Mr. Gollobin: Referring to the respondent—Yes.

Special Inquiry Officer to Witness:

Q. Mr. Morrow, when you answered the last question, were you referring to the gentleman seated over here, the respondent in this case?

A. Yes.

Mr. Gollobin to Witness:

Q. Now, did the transportation come right to the line where you were?

A. No. Depending upon where the line was. At Quinto, Yes; you could come up right to—at night you could come up to about fifty yards behind the line.

Q. And during the day?

A. And during the day, No. They didn't come up on that road. In Teruel, they came through the streets of Teruel in daytime, and close to the line.

Q. Well, so for the time that you were awake, about how many times do you claim you saw the respondent?

[fol. 50] A. At least 20 times.

Q. What were you doing at the time you saw him—you claim you saw him?

A. Various things. I could have been hanging around the ambulance; or—in an army, you do many things. I don't recall exactly what I was doing.

Q. I'm not asking you to speculate, Mr. Morrow. You tell me what you could have been doing. I'm asking you what you were doing. You are testifying under oath what you saw and did; and not you could have, or speculating what you could have seen.

Miss Binder: I object to this as being argumentative on the part of the attorney.

Special Inquiry Officer: Please proceed, Mr. Gollobin.

Witness: I'm here testifying solely that I knew this man in Spain. That is all. How I—What you are trying to do now, I don't know. But I came down here to say whether I knew this man or not, and I did. You are apparently trying to discredit me—right?

Mr. Gollobin to Witness: If you want the answer, I think you are discredited. That's vis-a-vis if you wanted me to answer your question . . .

Witness: Right.

Mr. Gollobin: You are testifying here under oath and you have no memory . . .

Special Inquiry Officer: Mr. Gollobin, will you please proceed with your cross-examination, if you have anything further to present in that manner.

Mr. Gollobin: I do.

Mr. Gollobin to Witness:

Q. Were you introduced to Mr. Levine?

Miss Binder: May I ask Counsel to fix the time.

Mr. Gollobin to Witness:

[fol. 51] Q. At the time you were in Spain were you ever introduced to this person you say you knew as Samuel Levine?

A. I presume I was—Yes.

Q. Mr. Morrow, I again say to you you are not here to speculate or to presume. You are here testifying to your direct knowledge—were you or weren't you—that's the question. You are testifying under oath—remember.

A. I do not recall being introduced.

Q. If you were not introduced to him, how did you know his name?

A. There are many people I have not been introduced to whose names I know.

Q. Well, on what basis did you know his name if you weren't introduced to him?

A. Probably—undoubtedly, some of the other men in my unit told me.

Q. You say "probably"; again I say you are testifying under oath to what you know—not probably. Do you realize that this is a serious proceeding in which a person's right to be and remain in the United States is involved. Do you understand that?

A. I do now—Yes.

Q. The Government cannot proceed on—is not claiming they're going to proceed on probability. They have to proceed on facts. So, you don't recall being introduced to this man. Is that correct?

A. That is right.

Q. About how many fellow members of the battalion and other brigades did you meet in Spain?

A. At least 100.

Q. I don't mean meet personally and know personally, but I mean have contact with in any way.

[fol. 52] A. I don't know. I don't know how many people I meet in the ordinary course of life.

Q. Could it be that you had contact there with several thousand over the period of time that you were there, in one way or another?

A. In one way or another—Yes. I had contact with 2,000 people.

Q. Do you have any memoranda from that time or notes?

A. Yes.

Q. You have them still in your possession?

A. Yes.

Q. Do they relate to your service in Spain?

A. Yes.

Q. Do they mention this gentleman's name?

A. I don't know.

Mr. Gollobin: I ask that these notes be made available.

Witness: These were letters to my wife. And I will not give them to you for the purpose of this proceeding.

Mr. Gollobin: My request stands.

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[fol. 53]

**Transcript of Hearing in Deportation Proceedings—
June 25, 1964**

**BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE
UNITED STATES DEPARTMENT OF JUSTICE**

File A-2 478 171—New York, N. Y.

**MATTER OF JOSEPH SHERMAN also known as: CHOIMA SZOR-
MAN, CHAYEM JOSEF SHERMAN, SAMUEL LEVINE, Respon-
dent.**

Before Special Inquiry Officer Edward P. Emanuel

• • • • •

[fol. 54] Miss Binder: Mr. Emanuel, I should like at this time to call as a witness Mr. Mason, the investigator.

Special Inquiry Officer to Witness:

• • • • •

Q. You may sit down. What is your full, real name, please.

A. Sidney E. Mason.

Miss Binder to Witness:

[fol. 55] Q. You are an employee of the United States Immigration and Naturalization Service?

A. I am.

Q. And what is your title?

A. I am an investigator.

Q. Do you know the gentleman who is sitting diagonally opposite you?

A. I do.

Q. And how do you know him?

A. The gentleman is Mr. Sherman. I know him by virtue of the fact that I was instructed to serve an order to show cause, which instituted the deportation proceedings which are taking place today.

Q. And have you also acted as an investigator in this case?

A. I have.

Q. Now, in the course of your investigation in this matter, did you have occasion to interview a gentleman by the name of Mr. Morrow?

A. I did.

Q. Do you recall when it was that you interviewed Mr. Morrow?

A. Yes. The interview took place around the early part of April of 1963.

Q. And where did you interview Mr. Morrow?

A. I interviewed Mr. Morrow at his place of employment which is the New York Times Building located on West 43rd Street in Manhattan.

Q. And about how long did that interview take?

A. Approximately 30 to 35 minutes.

Q. And during the course of your interview with Mr. Morrow, did you take notes?

A. I did.

Q. Did you record the questions you asked Mr. Morrow?
[fol. 56] A. No. I did not.

Q. Did you record verbatim the answers Mr. Morrow gave you?

A. No. I did not.

Q. Do you recall the nature of the notes which you took at that time?

A. Specifically, No. I do not recall the exact nature of the notes.

Q. Do you recall specifically what information you developed by interviewing Mr. Morrow?

A. Well, generally, I would say Yes.

Q. After the interview was concluded, Mr. Mason, you left the office of Mr. Morrow with some notes. Is that correct?

A. I did.

Q. And what did you do with those notes?

A. When I returned to the office later that day, I transposed those notes into a more rhetoric fashion; it was made into the form of a draft report of the interview. This was done in my own hand, and made in preparation for a report which would be written at a subsequent date.

Q. And did you at a subsequent date write such a report, or dictate such a report?

A. I did.

Q. And do you recall when it was that you wrote your report?

A. Yes; approximately the latter part of April or the early part of May, last year.

Q. And was that a report exclusively of your interview with Mr. Morrow?

A. No. The report included material other than that that concerned itself with the interview with Mr. Morrow.

Q. And after you prepared your report, what did you do with the notes?

[fol. 57] -A. I destroy them.

Q. And why did you destroy the notes?

A. Because I had no further use for the notes. I had rechecked the notes against the report, and inasmuch as they were represented to be correct, I destroyed the notes.

Q. Did your report contain all the information which you had noted in reports of your interview with Mr. Morrow?

A. Yes. It did.

Q. Mr. Mason, I show you now a classified report which consists of nine pages. Will you tell me whether this report contains the information which you developed from your interview with Mr. Morrow?

A. Yes. It does.

Q. And in what portion of this report is the information regarding your interview with Mr. Morrow contained?

A. The information is reflected on pages 6 and 7 of the report.

Q. Now, Mr. Mason, will you tell me, please, do you, in the course of the job as an investigator—do you retain notes of interviews in the course of the investigations which you make?

A. No. It is the normal practice to destroy the notes after they have been reduced to writing in a report.

Q. Do you ever retain notes in any case?

A. Yes. There are occasions.

Q. On what occasions do you retain the notes?

A. That would occur when, in the course of an interview, information is developed which leads to a statement in writing, and in response to specific questions, and if it's very material, and if a statement is read and signed by the [fol. 58] individual who makes it, that becomes an important document, and eventually a part of the file, and is retained.

Q. Did you have Mr. Morrow sign any statement when you interviewed him?

A. No, ma'am.

Q. Did you record his answers verbatim?

A. No. I did not.

Miss Binder: Mr. Emanuel, at this time I offer for your inspection the report which Mr. Mason has identified, as well as a copy of that portion of it which relates to Mr. Mason's report of the interview with Mr. Morrow. This is a classified report and contains a lot of material which has no relationship to the witness in this case, Mr. Morrow. I am prepared to have Counsel see the portion of the re-

port which relates to Mr. Mason's interview with Mr. Morrow. And I ask that you rule as to whether or not the rest of the material on this classified report is relevant to the testimony of the witness.

Special Inquiry Officer: Before reviewing the material, Miss Binder, am I correct in understanding that you are willing to furnish—to show the excised copy of the report to the attorney, but not the original material. Is that correct?

Miss Binder: That is correct.

Special Inquiry Officer: I have compared the two. The original is now marked 18 A for identification only; the other 18 B for identification only. The excised portion does not relate to the witness's interview with Mr. Morrow; except on page 1 of 18 A for identification there is a synopsis of approximately six lines as to the interview by the witness of Mr. Morrow. That has not been reproduced on [fol. 59] the excised document. Both are now returned to the Trial Attorney.

It may be thought that Mr. Gollobin may wish to be furnished with document 18 B for identification.

Miss Binder: I ask that document 18 B for identification be received in evidence, Mr. Emanuel, and I will show it to Counsel.

Mr. Gollobin: I would request that the portion the Special Inquiry Officer referred to of the synopsis of Mr. Mason be made available to me.

Special Inquiry Officer: Will it be satisfactory, Mr. Gollobin, that I read it to you now, and it will be recorded as part of the record? Will that be satisfactory?

Mr. Gollobin: Yes, sir.

Special Inquiry Officer: The portion referred to reads:

"EDWARD A. MORROW (MROCZKOWSKI) interviewed. He made a vague identification of the person represented on the passport photograph exhibited to him and seemed to recall that he saw that person with a transportation unit in Spain during the Civil War. He was willing to person-

ally observe SUBJECT to convince himself before he could make a more positive identification."

The document # 18 B for identification is received in evidence as an exhibit bearing the same number.

Miss Binder to Witness:

Q. Mr. Mason, before you wrote your report which is now Exhibit 18 B, how many times had you personally interviewed Mr. Morrow?

A. This was the sole occasion that I personally interviewed him.

Q. And that, according to the report, took place on April 9, 1963.

A. Yes. I believe on or about that date.

Q. Now, in your report you refer to "Morrow was recontacted on April 18th and April 25th 1963." Do you recall what the nature of these recontacts were?

[fol. 60] A. Yes. I do.

Q. Will you tell us how you recontacted Mr. Morrow on April 18th and April 25th, as indicated in this report?

A. Inasmuch as Mr. Morrow had indicated to me that he was going to go back home and check his notes or perhaps some letters he had written, he wanted to make sure that he might be able to get more positive information to justify his then opinion that the photographs may relate to the individual he had in mind. I thereupon recontacted him on the first occasion, which was approximately a week later, and . . .

Q. How did you recontact him?

A. Telephonically.

Q. You spoke to him on the telephone then on April 18th. Is that correct?

A. That is correct.

Q. And was the recontact of April 25th of the same nature?

A. Yes. It was.

Q. And your only personal contact with Mr. Morrow, that is vis-a-vis, prior to writing this report, was on one

occasion and that on April 9, 1963, as reported. Is that correct?

A. That is the only time I interviewed the gentleman.

Q. Prior to writing . . .

A. Prior to writing the report.

Miss Binder: I have nothing further of the witness.

Mr. Gollobin to Witness:

Q. May I ask you, Mr. Mason, did you show Mr. Morrow, when you interviewed him on April 9th, certain photos?

[fol. 61] A. I showed him a photograph—Yes; or two.

Q. How many did you show him?

A. Two.

Q. Which photographs did you show him?

A. I showed him two photographs—both were the same—one was a smaller edition, and one was a more blownup picture.

Q. Do you have those photographs?

A. I do not have them with me. They are in the file.

Q. When you say "in the file," do you refer, or would you know if they are in the file before the Special Inquiry Officer?

A. I do not know. They were placed in the file.

Special Inquiry Officer to Witness:

Q. Mr. Mason, are you referring to the photograph which was in the passport of the respondent? Is that what you are referring to?

A. Yes, sir. I am referring to a passport photograph which was taken from the passport.

Q. Is this the photograph you are referring to, Mr. Mason? I show you photograph which is a part of Exhibit

7.

A. Yes. This is the photograph I showed to Mr. Morrow.

Mr. Gollobin to Witness:

Q. Is this photograph a photo with glasses?

Miss Binder: Mr. Emanuel, the photograph speaks for itself. I object to Counsel's question.

Special Inquiry Officer: Let me see the photograph, please.

Undeniably, the photograph does not show the subject thereof wearing glasses. The respondent is now wearing glasses.

[fol. 62] Mr. Gollobin to Witness:

Q. Mr. Mason, do I understand that since April 9, 1963 until today, you have not seen Mr. Morrow?

A. That is not what I said. I was asked how many times I had seen him prior to the writing of my report. And I so stated: once, personally.

Q. After writing your report did you see him?

A. Yes. I did.

Q. How many times?

A. Two occasions.

Q. What dates?

A. Offhand, I can't give you the exact dates, but the approximate dates: I saw Mr. Morrow for the second time on the day of the scheduled hearing which was held in February of this year. On that day, I met Mr. Morrow in the lobby of the premises at 20 West Broadway, pursuant to a telephone call I had made to him a previous day, asking him to come to the hearing. And he said he would appear on that day. I escorted Mr. Morrow upstairs to the 14th floor of this building, since I was the only person who had met him on a previous occasion and would know him.

Q. Did you have him at that time meet the respondent?

A. No, sir. I did not have him meet the respondent.

Q. He simply waited with you preparatory to testifying later that morning. Is that correct?

A. Mr. Morrow came to the office just around the time when I think there was a short recess of this hearing. Mr. Sherman and, I believe, you, and, I think the lady sitting over there, to the best of my recollection, was seated at that time in the waiting room, or the reception room of [fol. 63] this floor. Mr. Morrow, when he came up with me, was placed in a certain position, which was directly in front of where Mr. Sherman was sitting. And at that time he observed, and was in a position to observe Mr. Sherman.

Special Inquiry Officer: In referring to the "lady sitting over there," the witness was referring to one of two ladies who had accompanied respondent into the hearing room.

Witness: To the best of my recollection, I believe that there were two ladies present that day. I think both of them were there.

Mr. Gollobin to Witness:

Q. And it was—was it on this basis then that you offered him as a witness?

Miss Binder: I object to this, Mr. Emanuel. Mr. Mason did not offer him as a witness. It was the Trial Attorney who offered him as a witness.

Special Inquiry Officer: Sustained.

Mr. Gollobin: May I then inquire, since the Trial Attorney is also present, that it was on this basis that the Witness Morrow was offered.

Miss Binder: Mr. Morrow indicated, after observing the respondent, that he could identify him, as he testified later in the record, and I decided at that point, since he was present, to put him on as a witness.

Mr. Gollobin to Witness:

Q. Now, am I to understand that you asked the witness everything he knew when you interviewed him on April 9th, and that this report fairly and correctly covers in substance what you asked him and he answered?

A. Yes. It is fair and correct representation of the interview.

Q. There is nothing that you have added or subtracted?

A. Nothing.

Q. Prior to your phoning Mr. Morrow on April 9th—[fol. 64] contacting Mr. Morrow on April 9th, did you know him?

A. No. I did not know Mr. Morrow prior to that day.

Q. On what basis then did you contact him?

Miss Binder: I object to that, Mr. Emanuel.

Special Inquiry Officer: Sustained.

Mr. Gollobin to Witness:

Q. Can you tell me what was stated by Mr. Morrow on April 18th?—when you phoned him.

A. Well, the substance of that reflected, I believe, in my report, and I can't remember the exact words he said. It was a very short conversation. I have a recollection of that. The substance was, to the best of my recollection, that he did not get a chance or an opportunity to look for the material he wanted to check over to see if he had the material. It was a very short conversation. I told him that I would call him back the following week. As a matter of fact, I specifically recall that he said, "It would be a good idea to do so." Because the following week, I believe he said, was the Easter vacation and he was going to be home, and it would give him a better chance to look around for his material.

Q. So, actually whatever information you got was derived from the second conversation with him on April 26th.

A. No. The information I got on April 26 supplements the information that he gave me, and I just made a short note of that and I reflected that on the bottom of my draft notes which I subsequently dictated almost word for word, or word for word in my final report.

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[fol. 65] Special Inquiry Officer to Witness:

Q. You may sit down. Please again tell us your name.

A. My name is Edward Morrow.

Mr. Gollobin to Witness:

Q. Have you brought your notes with you today?

A. I have not.

Mr. Gollobin: I ask that this hearing be deferred until the witness brings his notes.

Mr. Morrow, Witness: I looked for those notes and they are no longer available. Apparently my wife thinks she threw them out when the cellar was flooded three years [fol. 66] ago.

Mr. Gollobin to Witness:

Q. You've testified that you spoke to Mr. Mason some four months ago—that is, four months prior to the last time you appeared here. Is that correct?

A. Yes.

Q. Did you tell Mr. Mason that you had certain notes?

A. I told him I thought I had some letters at home—Yes.

Q. And this was after this so-called flood?

A. This was after the flood—Yes.

Q. What happened to the notes then that you had in mind when you spoke to Mr. Mason?

A. Those were the notes—the same thing—these letters I had written to my wife.

Q. Well, didn't you know then, after talking to Mr. Mason, and looking for them, that those notes weren't available?

A. No. I did not.

Q. After talking to Mr. Mason didn't you look for those notes?

A. Not—in a haphazard fashion—not very thoroughly. This time I asked my wife, and I went up the attic.

Q. So when you told Mr. Mason you had looked for them, you really hadn't looked for them. Is that right?

A. Yes, I had looked for them but in a haphazard way.

Q. And what do you call a non-haphazard way?

Miss Binder: I object to this as harassment, Mr. Emanuel.

Special Inquiry Officer: Overruled.

Witness: I went up to the attic, and I didn't think it [fol. 67] was of so much importance at that time until I came here and realized the importance and realized the importance of the case.

Mr. Gollobin to Witness:

Q. Now, after talking to Mr. Mason did you find any notes?

A. No.

Q. Well, did you tell Mr. Mason that you had looked at any of your notes?

A. I don't recall having said that— No.

Q. Now, if Mr. Mason said you had, would his memory be better than yours?

Miss Binder: I object to that. There is no indication that there was any statement of such . . . by Mr. Mason.

Special Inquiry Officer: Overruled.

Witness: Well, if Mr. Mason said that I'd looked at notes, would his memory on that be better than mine? I don't know whether his memory is better than mine or not.

Mr. Gollobin to Witness:

Q. Well, if his memory is different than yours, and opposite of yours, which would you say is the truth?

A. —

Miss Binder: I object to this, Mr. Emanuel. This is pure conjecture and I suggest that Counsel read to the witness what Mr. Mason did say.

Special Inquiry Officer: Overruled.

Witness: What is the question?

Special Inquiry Officer: We will repeat the electronic recorder.

Witness: The only thing I recall having told Mr. Mason is that I thought I had some letters at home and I would refer to them. I went and searched for them in the attic, but I did not refer that search to my wife. This time I did. [fol. 68] There were no notes that I had—just letters.

Mr. Gollobin to Witness:

Q. But the point is: Did you at that time refer to letters or notes or whatever you want to call them?

Miss Binder: I object to Counsel not fixing the time. When he says "at that time," what time is he talking about?

Mr. Gollobin to Witness:

Q. At the time you answered Mr. Mason on April 9—when you spoke to him and he asked you about these notes.

A. If I recall, I tried to find notes and I couldn't find them—that's all.

Q. Now, Mr. Mason says that you stated that you had made a search of your notes and there was nothing additional in these notes. Was Mr. Mason correctly telling what you had said?

Miss Binder: I object to that. It does not reflect what Mr. Mason said. Counsel is referring to the report and I would suggest that he read from the report when he is questioning the witness.

Special Inquiry Officer: Sustained.

Mr. Gollobin: I have done so.

Miss Binder: You have not, sir.

Special Inquiry Officer: The attorney has presented to me Exhibit 18 B. We will now show it to the witness and...

Mr. Gollobin: I object to showing the entire statement at this time to the witness.

Special Inquiry Officer: Very well. Then I will read the portion which appears to me to be the matter concerning which you are inquiring.

Mr. Gollobin: . . . refer to one sentence in paragraph—the last paragraph.

[fol. 69] Special Inquiry Officer: Recess.

Special Inquiry Officer to Witness:

Q. In the document which is now in evidence as Exhibit 18 B, Mr. Morrow, Mr. Mason reported that on April 9, 1963, you were interviewed. After stating additional things, Mr. Mason continued his report with the assertion that you were recontacted on April 18 and April 25, 1963. Mr. Mason reports that you advised that you could come up with nothing additional after you made a search of your notes. Do you understand?

A. Yes, sir.

Miss Binder: Just a minute, Mr. Emanuel. May we also point out to the witness that Mr. Mason in referring to recontacting him on April 18th and April 25th has testified that this recontact on both occasions was by telephone.

Special Inquiry Officer: Yes. That is correct.

Mr. Gollobin: I request that the witness answer the question of record.

Special Inquiry Officer: Certainly.

The last unanswered question will now be played back on the electronic recording.

Witness: Well, I told Mr. Mason I searched the notes and I found—I think I found—I'm sure I found a couple of postcards. But that's all I found in the attic and I could find nothing to add to what I told him before. That is what I meant by notes.

Mr. Gollobin to Witness:

Q. Mr. Morrow, did you testify as to your having these notes the last time I cross-examined you?

A. I believe I had them— Yes.

[fol. 70] Q. And did you say these were letters to my wife and I will not give them to you for the purpose of this proceeding?

A. I did.

Q. . . . that correctly reflect your feelings?

A. If I had the notes or letters now I would not produce them for the purpose of this proceeding. But I don't have them. The situation has changed.

Q. Isn't it a convenient invention that you have now made because you don't want to produce these—as you say they are letters to your wife?

A. It is not a convenient— No. It is not a convenient . . .

Q. In other words, you are testifying you have no way of possibly refreshing your recollection as to the events in Spain, based on any personal materials that you have?

A. Yes.

Q. And you have not been able, since you left there, to so refresh your recollection in connection with this proceeding?

Miss Binder: I object to this, Mr. Emanuel. This is not part of the testimony of this . . .

Special Inquiry Officer: Sustained.

Mr. Gollobin to Witness:

Q. At the time you talked with Mr. Mason, had you looked at the material that you are now referring to?

A. No.

Q. Had you any inclination that you were ever going to be called as a witness in a proceeding?

A. No.

[fol. 71] Q. When did you speak to Mr. Mason the first time?

A. When he came to my office—early '63.

Q. You testified here on February 25, 1964. Do you recall that?

A. Yes. I do.

Q. And do you recall when you were here previously, you were asked the following question: "When was the first time you spoke to a representative of the Service?"

Do you recall your answer?

A. No. I do not.

Q. Do you recall when you testified here the last time?

A. Yes. February, this year. I don't recall . . .

Q. You don't recall the date exactly?

A. No.

Q. You don't recall though what you said at that time.

A. I presume I said the same thing I'm saying now: Sometime early in '63 when he came to my office.

Q. Well, I read from the record that your answer was: "About four months ago."

[fol. 72] A. I was mistaken—that's all. It didn't make such an impression on me.

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Q. Now, when you were questioned by Mr. Mason, what did you tell him on April 9, 1963—what did you tell him as to what you knew about the person that he was questioning you on?

A. Well, as I said, if I recall, he showed me a couple of pictures and he asked do I know this person under a certain name . . . name was Sherman. I said, "No. I don't know him. I don't recall a person by the name of Sherman who looks like this."

Q. Did he identify this individual in any further way?
[fol. 73] A. No. He later on—well, from the line of questioning, when he asked me had I been to Spain—was I ever . . . , I presumed what the line of questioning was going to be, and then he asked could I identify Sam Levine, and I said No, I couldn't, but by his looks, it rang a bell in my mind.

Q. When you say it "rang a bell," is that when you could identify him?

A. It appeared to me that that was a photograph of Sam Levine— Yes. The person I had known as Sam Levine.

Q. Now, I'm reading to you from Mr. Mason's statement as follows—paragraph 2: "When asked if the name Joseph or Joe Sherman or Samuel or Sam Levine had any significance to him, or if a person bearing such name had been on the S.S. Aquitania trip abroad in June 1937—or on the S.S. Ausonia return voyage in December 1938, he stated that he could not recognize the name." Did you tell Mr. Mason that?

A. Yes. I told him that I did not recognize this man as Sherman.

Q. And did you also tell him that after he had mentioned the name Sam Levine you did not recognize the name?

A. I do not recall saying anything on that.

Q. I'm not asking you whether you recall. I'm asking you whether this corresponds to the truth.

A. Well, will you read again what Mr. Mason said—I'll try . . .

Q. I have just read it to you. Can you recall now on the basis of what I have just read to you or not?

A. No.

Q. Now, Mr. Mason did state in this report, based on his interview with you, that you stated, after hearing the name Joseph or Joe Sherman or Samuel or Sam Levine—that you stated you could not recognize the name. Was that a [fol. 74] true report by Mr. Mason?

A. I guess, yes.

Q. Do you recall your testimony on this question when you were here in February of this year?

A. No. I do not.

Q. You don't recall what you were asked and answered?

A. No. I do not.

Q. I read from page 45: He (referring to Mr. Mason) asked me whether I could identify them (the photos) as Mr. Sherman—that's your answer.

Question: "And what was your answer?" "No. I could not identify them as Mr. Sherman."

"And who was the other photograph?" "They both were the same person."

"And what other questions were you asked?" "He then asked me whether the name Levine meant anything to me."

"What was your answer?" Answer: "I said that rang a bell."

Question: "What was the bell it rang?" Answer: "In my mind the name Levine was somewhat like the type of fellow on this photograph."

Now, how is it that you testified in February that when you were questioned by Mr. Mason that the name Levine rang a bell, and Mr. Mason has said, based on an interview with you, that you could not recognize the name?

A. All I recall telling him is that I could not recognize the name of Sherman.

Q. So you do not feel that it is correct what Mr. Mason has said that he also mentioned to you the name of Samuel or Sam Levine at the same time that he mentioned to you Joseph or Joe Levine, and that you had stated to him that—quote: You could not recognize the name.

A. On the Levine part, I don't recall having told him that.

[fol. 75] Q. Now, when Mr. Mason questioned you did he give you any details about Mr. Sherman?

A. No. He did not.

Q. None whatsoever?

A. No. He just told me that there was an immigration case where he was involved and could I help him in his investigation.

Q. Now, I read you from Mr. Mason's statement, where he says: "When furnished additional background data regarding the subject, he (meaning you) again advised that he could not tie it in with the person represented by the photograph." Now, was Mr. Mason not stating the truth when he made this notation in his report?

A. As I said, he told me, "This is a case involving an immigration case," and that's the background he gave me.

Q. Well, would that be identifying data? Would it help you identify Mr.—the respondent here?

Miss Binder: I object to that, Mr. Emanuel.

Special Inquiry Officer: Overruled.

Witness: I don't know what he considers identifying data.

Mr. Gollobin to Witness:

Q. Well, would you consider that by telling you that the subject was involved in a deportation proceeding, that would enable you to identify him better?

Miss Binder: I object to that. The witness has not [fol. 76] identified the respondent according to that report, Mr. Emanuel.

Special Inquiry Officer: Overruled.

Witness: Well, it didn't help me identify him.

Mr. Gollobin to Witness:

Q. Is it your statement then that the only background data you claim that—additional background data you would claim that Mr. Mason furnished you was to tell you that the respondent here was involved in a deportation proceeding?

A. He may have told me other things but I don't recall them now.

Q. But the net effect of whatever he told you was that at that time you could not tie it in—the data, with the person represented by the photograph. Is that correct?

A. I could not identify it as Mr. Sherman— No.

Q. Mr. Morrow, you have had no way to refresh your recollection since that time. Have you?—from records.

A. About . . . No. About what? About this— No.

Q. Whatever you are able to tell has to be purely on the basis of your memory. Is that correct?

A. About my . . .

Q. Your knowledge of the—what you are testifying to with regard to the respondent and yourself.

A. Well, the only thing I've had since then is . . . what I testified to the other day.

Q. My question is: You have not had any other way of refreshing your recollection, and you are depending entirely upon your memory. Is that right?

A. Yes.

[fol. 77] Q. Now, in that statement of Mr. Mason he says that the witness—referring to you—stated he would check his records and notes at home to ascertain if he could come up with a more specific identification of the person he had in mind. Did you do so?

A. As I told you before— Yes. I went up to the attic to look for these things.

Q. And you were not able to give Mr. Mason any further information accordingly. Is that right?

A. That's right.

Q. You are certain of that.

A. Yes. I may have told him I knew Mr. Sherman as being in the Transportation Corps. I don't know whether I mentioned that to him at that time or not. Of course, the only thing I had with him was telephone conversations after that, you know.

Q. Now, with regard to the telephone conversations, what was the—what took place with the first conversation you had with him?

A. I don't recall.

Q. When was this first telephone conversation?

A. I don't know.

Q. How many conversations did you have with him?

A. I think there were two; but I'm not sure.

Q. Well, what took place at the second conversation?

A. He asked me whether I could come down to this building to look at a person and see whether I could identify him.

Q. And what was your answer?

A. I'll try— Yes.

[fol. 78] Q. And when did he ask you to come down?

A. He asked me to come down some morning . . . the morning we had this hearing here.

Q. Well, how long before you came down here—to this hearing here, did he ask you to come down?

A. I don't recall when that was. Maybe a month before—I don't know.

Q. Before you came down and saw the respondent.

A. That's right.

Q. Now, was there anything else asked you?

Miss Binder: May we ask Counsel . . .

Mr. Gollobin: At that time.

Miss Binder: At which time?

Mr. Gollobin to Witness:

Q. The second time you spoke with Mr. Mason.

Special Inquiry Officer: Are you referring to the telephone call, Mr. Gollobin?

Mr. Gollobin: Yes.

Witness: He asked me whether I could come down and see whether I could recognize this person. And would I identify him if I did.

Mr. Gollobin to Witness:

Q. You have already testified to that. I asked you whether there was anything else, Mr. Morrow, or was that the whole conversation?

A. As far as I recall now— Yes.

Q. Were you shown a photograph by Mr. Mason?

A. Yes.

Q. Did you recognize the photograph of the individual by looking at the photograph?

[fol. 79] A. After looking at it for some time, I remarked that there is something familiar about . . . that it looks like a person I know.

Q. Were you able to identify this person?

A. I don't think so.

Q. Do you know whether you were or weren't?

A. I am quite sure I did not identify him.

Q. Now, when did you—when you came here to this building in February, when did you first see this respondent?

A. When he was seated in the big anti-room outside.

Q. And where were you at that time?

A. I was taken inside here and allowed to sit down on the other side of the window here—the partition—and “take your time—can you recognize this man?”—“take your time. Do you recognize this man.”

Q. And you stated then—what?

A. I think I said I can't be sure. I think I had all-told about a half hour or . . . to observe the respondent, and then I said, “Yes. This is Mr. Levine.”

.

Q. Was this person you say was in Spain, was he in your medical unit?

A. He was not.

Q. Was he in your quarters at all where you were trained near Albacete?

A. He was about at times—Yes.

Q. Was he— You are not answering the question. I asked you whether he was in your quarters in Albacete. Where you were living.

A. I would presume—Yes.

[fol. 80] Q. You now remember it . . .

A. No. I do not remember it.

Q. Well, don't presume what you don't remember. We are here under oath, asking you what you remember. Was he one of your medical unit?

A. No.

Q. Was he one of your rifle team?

A. No.

Q. Do you remember the name of anybody else in this transportation unit?

A. There was a Canadian named Dave McKenzie.

Q. How many drivers would you say you ran up again with all these deliveries?

A. ... 60.

Q. Do you remember any others?

A. No.

Q. You say you weren't introduced to Mr. Levine?

A. I don't recall being introduced to him.

Q. Actually, Mr. Morrow, as you can see yourself, you have difficulty remembering things which occurred only last year. Is that correct?

A. True.

Q. And you are here testifying as to things which happened, according to your own testimony, roughly 27 years ago.

A. Yes.

[fol. 81] Q. And you have had no means of refreshing your recollection as to those events.

A. That's true.

Q. And you have no reason to specially remember any particular person's name, such as the respondent, whom you claim you know?

A. That's right.

Q. And you were not in his unit—the unit that you claim he was in. Is that correct?

A. Yes.

Q. Isn't it very well possible, Mr. Morrow, that under these circumstances—the lapse of time and considering also when you spoke to Mr. Mason your difficulty in recalling, and even the length of time that you had to look, by your own testimony, at this man when you were in this building that you possibly could be mistaken?

A. Such a possibility exists.

Miss Binder to Witness:

Q. Mr. Morrow, you have testified here that Mr. Levine is a person whom you saw in Spain. Was that testimony true?

A. Yes.

Q. Now, in answer to Counsel's question just now you said that the possibility exists that you are mistaken. Will you explain that, please.

A. The possibility—such a possibility always exists. There was another person who I have not seen for 25 years who I saw that same day, and after looking at him for 15 minutes, I recognized him—I said Vic Tiship. And he wasn't in my unit either, and, well, I'll be darned, I [fol. 82] had not seen for 25 years, and yet—well, he said he was Vic Tiship.

Q. And you recognized him.

A. Yes.

Q. Do you have any belief that at this time you are mistaken with regard to your identification of Mr. Levine as a person whom you saw in Spain?

A. No.

Q. You are positive you saw this man in Spain?

A. Positive— No. But I feel that I saw this man in Spain.

.

[fol. 83] Q. Now, you have testified here, Mr. Morrow, that your recollection of Mr. Levine in Spain is the fact that he was connected with a transportation unit there. Is that correct?

A. Yes.

Q. And you testified that you recalled seeing him in connection with transportation in Spain on approximately or about 20 occasions. Is that correct?

A. Yes.

Q. And this is to the best of your recollection?

A. Yes. To the best of my recollection.

Q. Can you tell me, you observed this man, you testified here, for approximately a half hour on February 25th

1964—can you tell me what about this man led you to the conclusion that he was the person you had seen in Spain?

A. Certain mannerisms—the way he carries himself, and the way he turned around . . . as the person I knew in Spain—that's all.

[fol. 84]

BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE

GOVERNMENT EXHIBIT 2

U. S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
150 Tremont Street
Boston 11, Massachusetts

RECORD OF SWORN STATEMENT

In re: JOSEPH SHERMAN

File No. A 2 478 171

PRESENT

JOSEPH SHERMAN	Subject
Attorney Lawrence Shubow	Representative
John W. Kinnevan	Investigator
Martin R. Schofield	Investigator
Ethel Carter	Stenographer

PLACE: 150 Tremont Street,
Boston, Mass.

LANGUAGE: English

DATE: March 30, 1961

INVESTIGATOR KINNEVAN TO SUBJECT:

Q. Mr. Sherman, I am an officer of the United States Immigration and Naturalization Service, and as such am empowered by law to administer oaths and take testimony in connection with the enforcement of the Immigration and

Nationality Laws of the United States. I desire to take a statement from you under oath concerning your right to be and remain in the United States. Do you understand?

A. Yes, sir.

Q. Any statement which you make must be voluntary and of your own free will, and such statement may be used against you by the Government as evidence in any civil or criminal proceedings. Do you understand?

A. Yes, sir.

Q. Are you willing to make such a statement under oath?

A. I don't know what the statements are.

Q. The statements, as I just explained, are concerning your immigration status, whether you have a right to be in this country or not.

A. I came to this country legally in 1920 with my family as a boy of fourteen.

[fol. 85] Q. Are you willing to make the statement?

A. I will give you all the information I can possibly think of.

Q. Do you solemnly swear that all the statements you are about to make will be the truth, the whole truth, and nothing but the truth, so help you God?

A. So help me God.

Q. What is your full and correct name?

A. Joseph Sherman.

Q. Have you ever used or been known by any other name?

A. (After consultation with attorney) On the advice of my counsel I think I will decline to answer that.

Q. On what grounds?

A. That they will tend to incriminate me.

Q. Do you have reason to believe that you might incriminate yourself?

A. I am going under advice of my counsel, sir.

Q. Do you mean that you claim the Fifth Amendment?

A. My counsel advised me not to answer that.

Q. Are you willing to tell us what your old country name was?

A. It was translated from Jewish into English. Yossef would be my first name. Sherman would be the family name, only it is pronounced differently.

Q. Did you use that same name in the old country, same spelling?

A. Yes, sir.

Q. Where do you live?

A. I live at 549 Center Street, Newton.

Q. Where were you born?

A. In Poland.

Q. What place?

A. Warsaw.

[fol. 86] Q. And your date of birth?

A. January 1, 1906.

Q. Are you a citizen of Poland?

A. I really don't know.

Q. Have you ever been a citizen of the United States or a citizen of any country other than Poland?

A. No, sir.

Q. How long have you resided in the United States?

A. Since 1920.

Q. What date in 1920, and where did you enter the United States?

A. I believe it was the month of August, in Ellis Island.

Q. Do you recall the day and the name of the vessel?

A. I am not sure, but I believe the day was the 20th and the vessel, the "Imperator" or something like that.

Q. What is your occupation?

A. I am a cab driver.

Q. By whom are you employed?

A. Yellow Cab Corporation in Boston.

Q. Were you registered in 1940, as required of all aliens then living in the United States?

A. Yes, sir.

Q. Do you have any evidence?

A. Yes.

(Presents Form AR-3 issued to Joseph Sherman, 3029 Brighton 4th Street, Brooklyn, New York, bearing number 2 478 171.)

Q. I show you now Alien Registration Form AR-2 bearing number 2 478 171 in the name of Joseph Sherman, executed at Brooklyn, New York, October 11, 1940. Will you look at this and state if it relates to you and if your signature appears on the reverse. In other words, is that the form you filled out when you registered?

A. (After examination) Yes, sir.

• • • • •

[fol. 87]

BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE

UNITED STATES DEPARTMENT OF JUSTICE

File A—2 478 171—New York, N. Y.

In Deportation Proceedings

IN THE MATTER OF

JOSEPH SHERMAN

also known as:

JOE SHERMAN, CHOIMA SZORMAN, CHAYEM JOSEF SHERMAN,
SAMUAL LEVINE, SAMUEL or SAM LEVINE, Respondent.

Charge: I & N Act—Section 241(a)(2) (8 USC 1251
(a)(2))—entered without inspection.

Application: None.

In Behalf of Respondent: Ira Gollobin, Esq., 1441 Broadway, New York 18, N. Y.

In Behalf of the Service: Clara Binder, Trial Attorney, New York, N. Y.

DECISION OF THE SPECIAL INQUIRY OFFICER—

September 10, 1964

The sole issue is whether respondent is deportable as charged in the order to show cause.

At his initial deportation hearing April 5, 1963, respondent testified he is Joseph Sherman, 57 years of age. At that hearing respondent also testified, as alleged in the [fol. 88] order to show cause, that he is an alien, and had been born in Poland. He asserts, however, that he is not now a citizen of that country, as alleged in the order, but declines to say whether he was last a citizen of Poland. On a claim of privilege under the fifth amendment, respondent refused to testify further regarding the remaining allegations in the order to show cause which assert:

- "3. You last entered the United States at New York, New York, on or about December 20, 1938.
4. You then claimed to be a citizen of the United States.
5. You were not then inspected as an alien by an officer of the United States Immigration and Naturalization Service."

The order to show cause charges that respondent is deportable under Section 241(a)(2) of the Immigration and Nationality Act in that he entered the United States without inspection.

An alien who gains admission to the United States upon a false representation of citizenship thereof is deportable on the ground that he entered without inspection. (*Ex parte Saadi*, 23 F. 2d 334, 336 (S.D. Cal. 1927), *aff'd* 26 F. 2d 458 (9th Cir. 1928), *cert. den.* 278 U.S. 616; *United States ex rel. Volpe v. Smith*, 62 F. 2d 808, 812 (7th Cir. 1933), *aff'd* 289 U.S. 422).

Because respondent refused to acknowledge the correctness of the 3rd, 4th, and 5th allegations in the order to show cause, the burden of establishing deportability by reasonable, substantial and probative evidence is on the Government (Section 242(a)(4) I&N Act).

[fol. 89] The Government subpoenaed and presented Samuel Rubinsky as a witness at respondent's deportation hearing. Mr. Rubinsky testified that upon the request of

respondent, whom he knows as Joe Sherman, he had accompanied respondent to a Government office in June 1937 in order to sign a paper for respondent. The witness stated he did sign the paper and identified his signature on an "Affidavit of Identifying Witness," dated June 8, 1937, on a United States Department of State "Passport Application Form For Native Citizen" filled out and executed the same date in the name of Samuel* Levine, who asserted birth at Brooklyn, New York, October 7, 1909.

Attached to the application form is a photograph which Mr. Rubinsky identified as being that of the respondent, Joe Sherman, as he had appeared in 1937. The description of the applicant set forth in that form: 5', 4", blond hair, blue eyes, a scar on the back of his right hand, was observed by us at the deportation hearing to be applicable to respondent. When questioned March 25, 1959 under court order (Exhibit 8), record of which testimony has been received in these deportation proceedings as Exhibit 9, Mr. Rubinsky acknowledged he had signed the passport application for Joseph Sherman, and that he had never known any Sam Levine. Respondent declined to cross-examine the witness.

Respondent also declined to answer questions regarding the passport application asked him by the Trial Attorney. The application was received in evidence as Exhibit 6, accompanied by certification from the Secretary of State [fol. 90] that the application is the original document from the State Department files upon which passport #439406 was issued June 10, 1937 in the name of Samuel Levine.

Original United States passport with the foregoing name, date of issuance and number, with a description of the bearer and photograph identical with those in Exhibit 6, has been received in evidence as Exhibit 7. The document is attached to Department of State certification that it is

* The given name in these proceedings is variously referred to as Samual, Samuel and Sam. The differentiation is not of importance, and we will not necessarily contradistinguish.

from its files. Respondent likewise has declined to answer questions propounded him by the Trial Attorney concerning the passport.

The passport contains a French visa issued at New York, June 15, 1937, and an endorsement in that language by the Commissariat Special stating: "Seen on Debarking June 22, 1937."

Upon proffer by the Government, the following documentation has also been received in evidence: Exhibit 15, authenticated photostatic copy of page of the passenger manifest of the S.S. Aquitania's arrival at Cherbourg, France, June 22, 1937, listing the name Samuel Levine, 27, a United States citizen; Exhibit 16, reproduction of communication dated October 16, 1937 from the American Vice Consul, Cherbourg, France, to the Secretary of State, Washington, D. C., a "List of American Citizens suspected of having been En Route to Spain as Volunteers for the Loyalist Forces, and who arrived at Cherbourg during the Period January 1, 1937—September 30, 1937," which on page 8 under the June 22, 1937 arrival at Cherbourg of the S.S. Aquitania lists Samuel Levine, age 27, and which is certified by the Archivist of the United States as being from [fol. 91] the General Records of the Department of State; Exhibit 17, document similarly certified which is reproduction of telegram dated December 3, 1938 to the Secretary of State from Barcelona referring to passports which had been endorsed and, on page 2 thereof, referring to Samuel Levine, 439406, June 10, 1937. Page 6 of the passport, Exhibit 7, contains endorsement by the American Consulate General at Barcelona, Spain, December 2, 1938, that it is "valid only for direct return to the United States."

The Government also presented as a witness Edward Morrow, whose name had been changed from Mroczkowski by court order in 1941. The witness, born in the United States in 1915, testified he had left this country in June 1937, and returned here about December 1938, and that during the interval had served with the Loyalist forces in the war in Spain. Mr. Morrow testified that while so

serving he had there met respondent about twenty times, and that respondent was in the Transportation Corps. The witness stated that at that time he knew respondent by the name of Sam or Samuel Levine. Mr. Morrow also testified his return to the United States was aboard the S.S. Ausonia, and that respondent had returned from Spain on that ship with him.

The passport, Exhibit 7, bears on page 4 an endorsement by the Immigration and Naturalization Service, United States Department of Labor, stating: "Arrived Dec 20 1938."

Exhibit 18, copy of another document certified by the Archivist of the United States from the General Records of the Department of State, is a cablegram from the American consul at Le Havre, France, dated December 10, 1938, listing the names of 145 volunteers from Spain who sailed [fol. 92] on the S.S. Ausonia. Page 2 thereof contains both the names of Samuel Levine and Edward Mroczkowski.

Exhibit 10 is Immigration and Naturalization Form I-404 A stating that Samuel Levine, born in Brooklyn, N. Y., October 1, 1909, a citizen of the United States, had entered this country at the port of New York, December 20, 1938, aboard the S.S. Ausonia, listed on manifest #26-30-13482.

We observe that though given opportunity to do so, respondent has not submitted anything contravening the salient evidence against him. We must find that the Government has established with a solidarity far greater than required that respondent is the person who applied for and received the United States passport in evidence as Exhibit 7, and that with that document he had reentered the United States December 20, 1938, claiming to be a citizen of this country named Samuel Levine.

Born abroad and now admittedly an alien, respondent must be found to have been an alien at the time of his entry to the United States December 20, 1938 (*United States ex rel. Meyer v. Day*, 54 F. 2d 336 (2nd Cir. 1931);

see also *United States ex rel. Rongetti v. Neelly*, 207 F. 2d 281 (7th Cir. 1953)).

Though then an alien, respondent was admitted to this country December 20, 1938, upon his claim of citizenship thereof. Because he was not at that time examined as an alien by an officer of the Immigration and Naturalization Service, respondent is now found deportable as charged in the order to show cause.

[fol. 93] In finding that respondent reentered the United States December 20, 1938, we are not unmindful of the collateral discrepancies and contradictions uncovered during the extensive cross-examination of witness Morrow. Those, however, which appear to be but the usual frailties of memory, create an aura of credibility and reliability to the witness' testimony as a whole. Furthermore, the witness, now a reporter for the "New York Times," forthrightly acknowledged there could be a "possibility" he is mistaken in his identification of respondent as having been in Spain. Mr. Morrow, however, testified that despite that possibility, he does not believe he is mistaken in his identification.

In determining that respondent is deportable we have not considered Exhibits 2, 3, or 4, which were received in evidence over respondent's objections. Parenthetically, however, Exhibit 3 is copy of decision October 30, 1961 by the United States Court of Appeals, 1st Circuit in *Sherman v. Hamilton*, 295 F. 2d 516 (cert. den. 369 U.S. 820).

According to respondent (Exhibits 11, 13), he appears to have originally entered the United States in August 1920. Despite his lengthy presence here, he has chosen not to apply for relief from deportation. We must, therefore, order he be deported. Respondent declines to designate the country to which he should be sent. Poland, accordingly, is specified as the country of destination.

The last deportation hearing August 6, 1964 was adjourned to October 5, 1964, with the agreement, however, that if by August 17, 1964, respondent not apply for the benefits of Section 243(h) of the Immigration and Nation-

[fol. 94] ality Act, or if by September 2, 1964 he not submit application for discretionary relief from deportation, proceedings not resume October 5, 1964, and our decision be made on the record through August 6, 1964.

No application under said Section 243(h) has been submitted, and by written communication dated August 25, 1964 (added to the record as Exhibit 19), respondent and his attorney advise that no request is being made for discretionary relief. Accordingly, no hearing was held subsequent to August 6, 1964, and this decision is based on the record existing at the close of that date's hearing.

Order: It Is Ordered that respondent be deported from the United States to Poland on the charge contained in the order to show cause.

Edward P. Emanuel, Special Inquiry Officer.

[fol. 95]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 29487

JOSEPH SHERMAN, Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

APPENDIX FOR PETITIONER—filed May 12, 1965

• • • • •

[fol. 96]

BEFORE THE BOARD OF IMMIGRATION APPEALS

U. S. DEPARTMENT OF JUSTICE

File: A-2478171—New York

In re: JOSEPH SHERMAN aka JOE SHERMAN, CHOIMA SZOR-
MAN; CHAYEM JOSEF SHERMAN, SAMUAL LEVINE,
SAMUEL OR SAM LEVINE.

In Deportation Proceedings

Appeal

Oral Argument: October 26, 1964

On behalf of respondent: Ira Gollobin, Esquire, 1441
Broadway, New York 18, New York.

On behalf of I&N Service: R. A. Vielhaber, Esq.

[File endorsement omitted]

Charges:

Order: Sec. 241(a)(2), I&N Act (8 USC 1251(a)(2))—
Entered without inspection.

Lodged: None.

Application: None.

OPINION—January 7, 1965

Respondent, a 57-year-old married male, a native and last a citizen of Poland, was admitted to the United States for permanent residence in 1920. Briefly, the Service position is that the respondent, using the name Sam Levine, applied for a United States passport, used it to go abroad and to return to the United States; respondent claiming privilege refused to testify on any question relating to a de-[fol. 97] parture from the United States. Counsel contends that although the record may contain evidence that respondent applied for the passport under the name of Sam Levine, there is nothing to show that respondent is the person who received the passport and used it. We believe the Service has borne its burden of establishing that respondent is deportable as charged.

The Service established that respondent, using the name of Samual (Sam) Levine, executed an application for a United States passport to which was attached his picture and a description which detailed to the point of showing a scar on the back of the right hand, fitted him; the application sworn to June 8, 1937 stated that it was the maker's intent to leave the United States on June 12, 1937. The passport was issued on June 10, 1937.

The passport contained a visa valid for entry to France; the Service established that it had been used to enter France on June 22, 1937 (Ex. 7), that Samuel Levine had been a passenger on a ship which arrived at Cherbourg, France on June 22, 1937 (Ex. 15), that the Samuel Levine who so arrived had been mentioned in a State Department

memorandum dated October 16, 1937 listing the names of Americans suspected of having entered France for the purpose of going to Spain as volunteers for the loyalist forces (Ex. 16, p. 5), that on December 3, 1938, a telegram sent from the American consulate in Barcelona, Spain to the Secretary of State listed the passport as having been endorsed in Barcelona (Ex. 17, p. 2), that the United States passport itself was endorsed at the American consulate general at Barcelona on December 2, 1938 validating it for return to the United States, that the name Samuel Levine appears on a State Department telegram dated at Havre, on December 10, 1938 listing 145 volunteers from Spain who sailed on the SS "Ausonia" for the United States (Government witness Morrow's name (Mroczkowski) is [fol. 98] also included (Ex. 18, p. 2)), that the passport bears a French stamp dated at Le Havre in 1938, that Samuel Levine entered the United States on December 20, 1938 on the SS "Ausonia" being destined to 403 Chester Street, Brooklyn, New York (manifest, Ex. 3, p. 8), that the respondent in about that period had lived on Chester Street (Ex. 2, p. 11), and that in 1943 he had shown that his parents lived at 403 Chester Street (Ex. E).

Government witness Edward Morrow testified that he saw the respondent in Spain between 1937 and 1938. The witness, a citizen of the United States, testified that in April 1963 he had been approached by a Service investigator and asked whether he had been in Spain in 1937 and whether he could identify a person shown in a photo (and its enlargement). The witness stated that there was something familiar about the person but that he could not identify him. To the question whether the person looked like Joe Sherman, the witness replied in the negative; to the question whether the person looked like Sam Levine, he stated that the person shown seemed to carry an association with the name of Levine, but he could not make an identification at the moment. Morrow expressed the belief that a review of letters he had written from Spain might help

refresh his recollection and he stated that he would be willing to make an observation of the respondent. Shortly thereafter, the witness made a rather casual search for his letters but found only a few postcards which did not help him. The investigator called the witness by phone twice in April 1963 and was informed that the search had revealed no additional information. Morrow made a careful search for the letters after February 25, 1964 and learned from his wife that they had been destroyed about three years previously after having been damaged in a flood.

On February 25, 1964 after having secretly observed respondent for about a half an hour, the witness stated the respondent had been in Spain with him, that he him-[fol. 99] self had served with the loyalist forces in Spain from about June 1937 to about December 1938, that respondent had been one of two hundred men who had trained with him, that he associated the respondent with deliveries of supplies made to a military unit to which the witness had been attached, that he had seen the respondent at least 20 times in Spain, that he could not recall having been introduced to him, or having personal contact with him, and that respondent was on the same ship on which he had returned to the United States in December 1938.

Morrow was unable to recall accurately when he had first been approached by the investigator, and he did not show a strong recollection concerning the names and details of events of the period in Spain. On cross-examination Morrow admitted that taking into consideration the lapse of time, the casual nature of the relationship, and the fallibility of his memory, the possibility existed that he was mistaken in his identification; however, with knowledge that the possibility of error existed he stated that it was his belief that he was not mistaken (pp. 99-100).

Counsel contends that Morrow's testimony is lacking in substance or probative value. Counsel stresses the fact that the witness admitted that there was a possibility that he was mistaken in his identification and he contends

that the witness' recollections concerning a superficial association over 27 years ago cannot form the proper foundation for the deportation of the respondent. We find the witness credible and his testimony probative and substantial. The record indicates that the witness is attempting to give best recollection and that he is testifying solely because of his belief that it is his duty as a citizen: no interest or bias is shown. We credit the witness' identification of respondent because the association though not close, was connected with a very important event—an event which [fol. 100] concerned the witness' life and honor. The witness had voluntarily and illegally gone to a foreign country to engage in a war on behalf of an ideal; the respondent had worked with the witness' unit in this war for the achievement of the ideal. Associations connected with this period could well remain despite the passage of years. The witness' ability to recall the substance of the distant period rather than precise details does not detract from his credibility because recall of such a nature is to be expected. The witness, firm in his belief that he made a proper identification, admits that the possibility of error exists; this admission is a mere acknowledgment of the fallibility of human memory; the witness' candor and moderation enhance his credibility.

Counsel is of the belief that Morrow's testimony should be stricken because there was, in his opinion, a willful failure to produce the letters the witness had written to his wife from Spain. The contention must be dismissed. The witness did not recall ever mentioning the respondent in any of the letters; he testified that the letters, damaged in a flood, were destroyed about three years ago. The witness testified without reference to notes. Counsel cites no authority which requires surrender of such letters if they do exist. We believe the record establishes the nonexistence of the letters. If they did exist, counsel had no legal basis for requesting their production (*United States v. Goldman*, 118 F. 2d 310 (2d Cir., 1941) *aff'd* 316 U.S. 129 (1942); *Gold-*

man v. Checker Taxi Company, Inc., 325 F. 2d 853 (7th Cir., 1963).

Counsel attacks Morrow's credibility by attempting to establish a discrepancy in the witness' statements concerning the existence of letters which would serve to refresh his recollection. We find no discrepancy. Morrow testified in June 1964 that the material consisting of letters he had [fol.101] written to his wife had been destroyed about three years previously; counsel believes that the testimony is in conflict with Morrow's statement to the Service investigator that he had notes and his testimony that he had searched for this material in April 1963. A reasonable reading of the testimony reveals that the witness had written letters to his wife during the period respondent was abroad, that the witness believed they were available when he spoke to the Service investigator, that he made a rather casual search for these letters in April 1963, that he was unaware at the time of this search that his wife had destroyed the letters some years previously, and that subsequently conducting a careful search he learned the letters had suffered water damage and had been destroyed.

Counsel does not deny that the Government has established that some person received the passport and used it to reenter the United States after having been abroad; however, he contends there is no proof that the respondent was that person. We believe the record establishes that it was the respondent who used the passport. The use of the name Sam Levine in applying for the passport is not important since it is established beyond any reasonable doubt that the respondent himself applied for the passport giving his true description, attaching his photo to it; and stating that he was going abroad. Under such circumstances, in the absence of evidence to the contrary, proof that the passport was used abroad raises a presumption that it was used by the person who applied for it and who is described by it. Respondent has produced no evidence to the contrary; there is no contradiction of the Gov-

ernment's case nor is there evidence to establish that the respondent was in the United States during the period in issue.

Counsel admits that under normal circumstances an inference is justified that the person who applied for a document was the one who received and used it, he contends, [fol. 102] however, that under circumstances involving fraudulent procurement of the passport, such an inference is not justified. The contention is dismissed. Respondent resorted to fraud to obtain something he was not entitled to; the facts that he applied, and that he furnished his picture and his description rule out, in the absence of evidence to the contrary, that he was not to be the beneficiary of the fraud. We fail to see why the respondent's fraud in securing his passport under these circumstances should place him in any different position than would be a person who applied for a passport without the use of fraud. We do not find, as counsel does, a balance between the inferences that the respondent did and did not receive the passport, and a balance between the inferences that he did and did not make use of the passport. We believe the record makes it a most unlikely hypothesis that it was one other than the respondent who received and used the passport.

Counsel contends that an adverse inference should be drawn from the unexplained nonproduction of the United States official who endorsed respondent's passport in Barcelona (Ex. 17) and who sent the telegram on December 10, 1938 listing respondent (and Morrow) as returning from Spain and sailing on the SS "Ausonia" and who inspected them on their arrival (Ex. 18). Counsel's contention must be dismissed. We do not believe that an inference unfavorable to the Government should be drawn from the failure to call the officials involved because the officials concerned are not Service employees, and, if available at all, they are as available to the respondent as to the Service, and because the likelihood of the officials recalling that the respondent was the individual they had briefly seen in the

performance of daily routine duties some 27 years ago, is so remote and so unnatural that there is no warrant for [fol. 103] inferring that the testimony of these officials was withheld because it would have been derogatory to the Government. Moreover, even without the evidence contained in the two exhibits, there is evidence that the passport was used abroad.

In connection with the last contention, and in connection with the admission of the other official documents, we would point out that the documentary evidence was admissible without the necessity of presenting the officials concerned with the making or receipt of the documents (28 USC secs. 1732, 1733, 1740, 1741).

Counsel contends that the burden is upon the Government to show that no one else could have used the passport; *Gastelum v. Quinones*, 374 U.S. 469, 479 is cited. The contention is rejected. In *Gastelum*, the Court held that uncontradicted testimony offered by the Service established that Gastelum had joined the Communist Party. The Court held that the Service had failed to present evidence to establish the alien's awareness of the political nature of the Party and could not repair the omission by reliance upon an inference drawn from the alien's silence. Our conclusion that the respondent was outside the United States after his original entry in 1920, is not based upon his silence but upon uncontradicted proof that he was seen abroad, and his action in applying for a document which described him, which was meant to be used by one going abroad, and which was used abroad. We do not see the relevancy of the citation.

We have drawn no inference from the respondent's silence on a claim of privilege; however, we believe that as an alternate ground for sustaining the charge, the corroboration the Service case receives from this silence is available. The drawing of an unfavorable inference is proper because answers concerning the making of an entry [fol. 104] over 25 years ago, cannot on this record which

contains no indication of convictions, indictments, recent questionable activity or associations, even remotely suggest the danger of a criminal prosecution.

Respondent is deportable. He has failed to apply for either of the two reliefs which, as far as this record shows, would permit the creation of a record of lawful entry. The appeal must be dismissed.

Order: It is ordered that the appeal be and the same is hereby dismissed.

Thos. S. Finucane, Chairman.

[fol. 105]

BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE

Portion of Investigation Report Relating to Edward A. Morrow (5-1-1963) (Exhibit 18B, Pp. 6-7; Item No. 21 in Index to Administrative Record

On April 9, 1963, Edward A. Morrow, a native born United States citizen, was interviewed at 229 West 43rd Street, New York City. He is a reporter for the New York Times. He stated that he was formerly known as Edward Mrowczkowski; that he was one of many college students who had gone to Spain to fight for the Loyalist Forces during the Spanish Civil War, 1937-1938; that he departed from the United States at New York around the middle of June 1937 and believed that the vessel was the SS "Aquitania"; that he became a Sergeant in the 15th Brigade and served with the Mac-Pap Division; that he returned to the United States in Dec. 1938 and believed that the name of the vessel was the SS "Ausonia."

The witness was shown the 1937 passport photograph of the Subject. He stated that the person represented thereon appears vaguely familiar to him and believes he may have been on the "Aquitania" sailing with him in June 1937. However, he could not recall anything specific regarding that person and could not further identify him. When asked if the name Joseph or Joe Sherman or Samuel or Sam

Levine had any significance to him, or if a person bearing such name had been on the SS "Aquitania" trip abroad in June 1937 or on the SS "Ausonia" return voyage in December 1938, with him, he stated that he could not recognize [fol. 106] the name. When furnished additional background data regarding the Subject, he again advised that he could not tie it in with the person represented by the photograph.

The witness stated that he would check his records and notes at home to ascertain if he could come up with a more specific identification of the person he had in mind.

At the time of the interview, Mr. Morrow displayed a willingness to cooperate. He was asked if he would consent to visually inspect the Subject and observe him, to determine if he is the person he had in mind. The witness was agreeable and stated that he would do so and that in the event he determined that it was the same person he would testify to this fact at a hearing.

Morrow was recontacted on April 18 and April 25, 1963. He advised that he could come up with nothing additional after a search was made by him of his notes. He stated however that he now seems to recall that the person he had in mind was a short fellow, about 5' 3" or 5' 3", blond hair, who was in Transportation with the Brigade in Spain during the Civil War. However, he still does not recall that individual by name nor can he positively identify him further. He was still agreeable to physically observe the Subject at our office if requested to do so.

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[fol. 107]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 521—September Term, 1964.

Argued June 9, 1965

Docket No. 29487

JOSEPH SHERMAN, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

Before: Waterman, Friendly and Smith, Circuit Judges.

By his petition brought pursuant to 8 U. S. C. §1105a(a) to review a final order of deportation issued by the Immigration and Naturalization Service petitioner seeks reversal of that order. Deportation order set aside and case remanded to the Service for its reconsideration in the light of the standard of proof set forth in our opinion.

Ira Gollobin, New York City, for Petitioner.

Francis J. Lyons, Spec. Asst. U. S. Attorney; Robert M. Morgenthau, U. S. Attorney; James G. Greilshaimer, Spec. Asst. U. S. Attorney, for Respondent.

[fol. 108] OPINION—September 22, 1965

WATERMAN, Circuit Judge:

This case arises upon a petition to review a final order of deportation by the Immigration and Naturalization Service holding the petitioner deportable under Section 241 (a)(2) of the Immigration and Nationality Act of 1952. 8 U. S. C. §1251(a)(2). We have jurisdiction to review this final order under Section 106(a) of the Act. Immigration

and Nationality Act of 1952, §106(a) as amended, 75 Stat. 651 (1961), 8 U. S. C. §1105a(a). *Foti v. I. N. S.*, 375 U. S. 217 (1963).

The petitioner, an alien, was born in 1906 in Warsaw, Poland. In 1920 he came to the United States and was admitted for permanent residence along with his mother and three sisters. The petitioner contends that the Government has not shown that he has not remained continuously in the United States ever since. The Government, however, seeks to prove that the petitioner traveled to France in June of 1937 using a United States passport issued in the name of Samuel Levine and returned to the United States on or about December 20, 1938 using this same passport, in this manner avoiding the inspection given to all aliens upon arrival in the United States. The Immigration and Nationality Act of 1952 provides that an alien in the United States who entered "without inspection" shall be deported upon the order of the Attorney General. 8 U. S. C. §1251 (a)(2). As there is no time limit on the operation of this section it is possible for the Attorney General to deport aliens who have been residents for a long period but who last entered the country without inspection. For example, this section permitted the Government to proceed against the petitioner in 1963 alleging an entry without inspection [fol. 109] almost twenty-five years earlier.¹ One might wish that the law had taken a different turning, but for better or worse Congress has determined that in order to implement the policy of alien inspection it is necessary to make an alien not properly inspected subject to deportation at any time. Therefore, if the Government's factual contentions are sustained the petitioner can be deported.

¹ Prior to 1952 the Government had only five years after an alleged illegal entry in which to commence proceedings. In the petitioner's case this period expired in 1943. Thus until the 1952 Act, eliminating all statutes of limitation in deportation proceedings, was passed, petitioner could not have been proceeded against. See Gordon & Rosenfield, *Immigration Law and Procedure* §4.6b (1959).

The Government "undertook to show affirmatively" that the petitioner had entered the United States in 1938 without inspection.² Once the Government chose to proceed in this manner, established rules of evidence instruct us that it assumed the burden of persuasion on this issue; that is, the Government assumed the burden of proving the existence of the facts which impose the legal consequences the [fol. 110] Government sought to invoke. See McCormick, *Evidence* §307 (1954). The Government did offer evidence tending to show entry without inspection in 1938, which evidence is precised in the margin.³ The petitioner elected

² The Government might have proceeded on a different theory. The petitioner refused to identify the record of entry of Chomia Szorman on August 8, 1920 as a record of his entry into the United States. As a consequence the time, place and manner of petitioner's entry into the United States were never officially documented. The Board of Immigration Appeals accepted it as proven that petitioner had entered the United States in 1920. Nevertheless, the Government suggests in its brief that since the record of entry of Chomia Szorman was never received in evidence the Government was in a position to take advantage of the presumption contained in §291 of the Act. 8 U. S. C. §1361. Section 291 provides *inter alia* that in any deportation proceeding the burden of proof is on the alien to show the "time, place, and manner of his entry into the United States." If this burden is not sustained, Section 291 goes on to state that the alien shall be presumed to be in the United States "in violation of law." If this presumption obtained in the present case it would be unnecessary for the Government to prove entry without inspection in 1938. But the Government did not proceed in the manner just outlined. No doubt it recognized the petitioner's lawful entry into the United States in 1920 had for all practical purposes been established. See *Sherman v. Hamilton*, 295 F. 2d 516, 518 (1 Cir. 1961).

³ The Government introduced evidence establishing that in June of 1937 petitioner had applied for and received a United States passport under the identity of Samuel Levine. It was also established that someone using the name Samuel Levine traveled to Europe on this passport aboard the SS Aquitania in June of 1937 and that someone using the name Samuel Levine returned to the United States on this passport aboard the SS Ausonia and arrived in this country on or about December 20, 1938. This evidence, of course, did not conclusively establish that Sherman was the individual so using the passport. The only direct evidence tending to

not to introduce any evidence and rested content after cross-examining the Government's chief witness in an attempt to weaken the probative force of his testimony.⁴ At the statutorily required hearing the special inquiry officer found on this evidence that petitioner was deportable for having entered the United States without inspection. Petitioner sought administrative review by the Board of Immigration Appeals of this determination. The Board made its own independent determination of all the disputed factual issues, as is its practice,⁵ and reached a conclusion identical to that reached by the special inquiry [fol. 111] officer. From all that appears in the record neither the special inquiry officer nor the Board paid any heed to the degree of belief that they were required to reach before they could find for the Government, other than to assume tacitly that the Government was simply required to establish the facts on which it relied by a "preponderance of the evidence." It is the petitioner's contention that the Board's decision must be reversed because a higher degree of persuasion is required.

The essence of petitioner's claim is that even though deportation is not a criminal penalty it is a penalty to

prove that petitioner left the United States in 1937 and returned in 1938 is the testimony of Edward Morrow who testified that he recognized petitioner as one of the persons who had served with him in the Spanish Civil War and that he recognized petitioner as one of the passengers on board the SS *Ausonia* on its return to the United States on December 20, 1938.

⁴ During the extensive cross-examination of Morrow it was stressed that Morrow was testifying to his ability to identify someone he claimed to have met but briefly some twenty-seven years ago; that Morrow admitted to having no "personal contact" in Spain with the individual he claimed was the petitioner; that Morrow when first shown the 1937 passport photograph of "Samuel Levine" did not identify it as the individual he had met in Spain; and that he could not positively identify petitioner as the individual he had met in Spain.

⁵ See Gordon & Rosenfield, *Immigration Law and Procedure* §1.10e (1959).

which serious consequences frequently attach and consequently the requirements of due process in deportation proceedings should be elaborated by analogy to the criminal law rather than to the law of economic regulation. In particular, petitioner contends that in his case the degree of belief which must exist before the Board of Immigration Appeals can conclude that the facts on which deportation depends are true should be defined as it is in criminal cases.⁶ Petitioner does not argue that due process requires the fact finder to have a degree of belief "beyond a reasonable doubt" in all deportation proceedings. He does contend that in such proceedings there is a distinction between the due process due an alien who has resided in this country for a long period of time and that due an alien who only recently came to this country. In the former situation petitioner claims that deportation is tantamount to banishment and that considerations of fairness imbedded [fol. 112] in the concept of due process requires that the Government prove its case beyond a reasonable doubt if it is to succeed.

Even a sympathetic reading of the Government's brief indicates that it largely misunderstands petitioner's argument. The Government invites us to examine the record of the administrative proceedings below and argues that the present deportation order must be sustained as it is based on "reasonable, substantial, and probative evidence." In support of this position the Government draws our attention to Section 242(b)(4), 8 U. S. C. §1252(b)(4), and Section 106(a)(4), as amended, 75 Stat. 651 (1961), 8 U. S. C. §1105a(a)(4), of the Immigration and Nationality Act of 1952. Section 242(b)(4) provides *inter alia* that

⁶ Although the petitioner's brief never says so in so many words, it is clear that in directing our attention to the degree of belief required in criminal cases petitioner refers to the common assertion that in a criminal proceeding the burden is on the prosecution to prove beyond a reasonable doubt all elements of the crime of which the defendant is accused. See 9 Wigmore, *Evidence* §2497 (3d ed. 1940). See generally McBaine, *Burden of Proof: Degree of Belief*, 32 Calif. L. Rev. 242 (1944).

"no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." And Section 106(a)(4) states that a deportation order, "if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive."⁷ Section 106(a)(4) is clearly a general description of the standard of judicial review that governs this and other federal appellate Courts in reviewing final orders of deportation under Section 106(a); that is, the question for the appellate court in reviewing an agency resolution of a disputed factual question is whether there was substantial evidence on the whole record to support the agency's finding. And even though Section 242(b) appears in a section of the Act prescribing agency procedures it is best understood as a restatement of the proper standard of judicial review and a reminder to the Board that final orders of deportation must be based on substantial evidence.⁸ The Government apparently believes that [fol. 113] these sections require a decision in its favor. In our opinion, neither section is relevant to a determination of the issue presently before this court.

The question raised by petitioner's claim concerns the degree of belief that must exist before the Board may conclude that an assertion of fact on which the Government has the burden of proof is true. Such a question is a question of law for a court to decide regardless of how reasonable the Board's resolution of the disputed factual issues in this case may have been. It might be argued, of course, that the Board resolved this question of law against the petitioner and this resolution should not be disturbed by this court on appeal. From the record, however, it is not

⁷ See generally Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record."* 64 Harv. L. Rev. 1233 (1951).

⁸ Gordon & Rosenfield, *Immigration Law and Procedure* §8.12c (1959).

clear that the Board did advert to the problem.⁹ And even if we assume that the Board did rule against the petitioner on this question of law we are not thereby foreclosed from reconsidering the question. There is no indication in the Act that Congress intended the Board to decide what degree of persuasion was appropriate in the case of a long-time resident alien threatened with deportation.¹⁰ Indeed, there is no indication in the Act that Congress adverted in any way to the problem of the degree of persuasion imposed upon the Government in deportation proceedings. The question raised by this petition concerns the degree of persuasion constitutionally required or otherwise appropriate in deportation proceedings involving long-time [fol. 114] resident aliens, and this is a question especially meet for judicial determination.

It is open to us to hold against the petitioner since the Supreme Court has repeatedly stated that deportation proceedings are civil in nature,¹¹ and ordinarily in civil actions the party having the burden of proof need only prove the existence of facts on which he relies by a preponderance of the evidence. 9 Wigmore, *Evidence* §2498 (3d ed. 1940). We do not believe, however, that we are required to conclude the present case in such a syllogistic fashion. As the Court insists that deportation proceed-

⁹ No discussion of this problem, as such, is contained in the Board's opinion. For the most part the Board simply credited the testimony of the government witnesses. It then concluded that this testimony was sufficient to establish the facts on which deportation depends.

¹⁰ If the Act evinced a Congressional desire to leave to the administrative agency the choice between the various degrees of persuasion potentially applicable in deportation proceedings we would be inclined to hold that the question was not meet for judicial determination even though it was a question of law.

¹¹ See, e.g., *Harisiades v. Shaughnessy*, 342 U. S. 580 (1952); *Bilokumsky v. Tod*, 263 U. S. 149 (1923); *Bugajewitz v. Adams*, 228 U. S. 585 (1913); *Fong Yue Ting v. United States*, 149 U. S. 698 (1893).

ings are civil we are precluded from reclassifying them as criminal, and, having thus reversed the major premise, then holding the degree of belief required in such proceedings is that which is required in criminal prosecutions. We are not, however, precluded from considering whether the Government should bear a higher burden of persuasion when it attempts to deport a long-time resident alien regardless of whether the proceeding is civil or criminal in nature. Because the realm of evidence law is one in which courts are especially expert,¹² and because rules regulating the degree of persuasion are traditionally judge-made,¹³ we believe that we may consider whether wisdom and justice require that the Government bear a higher burden of persuasion in the present case.

[fol. 115] It seems clear that due process requires that there be *some* test by which the fact finder can ascertain whether a fact does or does not exist in every legal proceeding.¹⁴ Perhaps due process also requires that in certain criminal proceedings threatening serious penalties the prosecution demonstrate that the facts on which guilt depends are almost certainly true; that is, that the jury must believe beyond a reasonable doubt that these facts exist before it can find for the prosecution. Having come this far it would not be a long step to conclude that this same higher degree of persuasion is constitutionally required in deportation proceedings involving aliens who have resided in the United States for a long period of time because in such a case forc-

¹² See 77 Harv. L. Rev. 556-59 (1964).

¹³ See generally McBaine, *supra* note 6. Professor McBaine assumes throughout his excellent article that the elaboration of rules regulating the degree of belief required in a given proceeding is the province of the judge. Of course, judges will often be constrained by precedent. But we are acquainted with no precedent that bears directly on the issue as we have formulated it on this appeal.

¹⁴ See McBaine, *supra* note 6, at 244.

ble expulsion would be tantamount to banishment—a penalty that surpasses in its enormity many imposed by the criminal law. We have nevertheless concluded that petitioner's constitutional claim should be rejected. Neither of the cases cited by petitioner convince us that the Court has announced the constitutional rule petitioner urges us to apply in the present case. Petitioner argues that in *Rowoldt v. Perfetto*, 355 U. S. 115 (1957) and *Gastelum-Quinones v. Kennedy*, 374 U. S. 469 (1963) the Court announced that due process requires the administrative agency to believe beyond a reasonable doubt that the facts on which deportation depended are true. Both *Rowoldt* and *Gastelum-Quinones* involved the threatened deportation of individuals alleged to be members of the Communist party within Section 241 (a)(6)(C) of the Act. 8 U. S. C. §1251(a)(6)(C). In both cases the Court reversed, holding the evidence of record did not demonstrate “meaningful” association. Although the issue is not free from doubt, we believe that in these cases the Court held that only individuals who “meaning-[fol. 116] fully” belonged to the Communist party could be deported under Section 241(a)(6)(C) and reversed because no evidence had been introduced establishing meaningful association—an essential element in the Government's case. The Court did not say in those cases that due process required that the Government prove the facts on which deportation there depended—meaningful membership—beyond a reasonable doubt. Whether due process does so require is still an open question, which we feel we should avoid because we can hold for the petitioner on a nonconstitutional ground.

As we have previously noted, the rules regulating the degree of persuasion in legal proceedings are traditionally judge-made. Thus, as to certain issues, courts have been free to conclude that it is fair and just to require a litigant in a civil action to carry a somewhat heavier burden of per-

suasion than litigants are required to bear as to the issues in most civil actions. 9 Wigmore, *Evidence* §2498 at 329 (3d ed. 1940). In some civil actions courts have even required that one party carry the burden usually borne by the prosecution in criminal proceedings. See, e.g., *Admire v. Admire*, 180 Misc. 68, 42 N. Y. S. 2d 755 (Sup. Ct. 1943) (necessary to prove nonaccess beyond reasonable doubt in overcoming presumption of legitimacy). We have concluded that the present case exemplifies a type of proceeding in which courts should require the Government to carry such a heavy burden. The petitioner entered the United States in 1920. The Government now seeks to deport him alleging that the petitioner left the country in 1937 and reentered without inspection in 1938. If the Government prevails, petitioner will be forcibly expelled from this country and returned to Poland, which is in no meaningful sense his country now. We do not say that the Government should not be able to proceed against petitioner after so long a time. We do hold that the Government is required to establish that it is al-[fol.117] most certainly true that petitioner entered the United States without inspection in 1938; in other words, the Government must prove beyond a reasonable doubt the facts upon which deportation depends.

We wish to stress that we do not hold this higher burden is imposed on the Government in all deportation cases. It is for the Board of Immigration Appeals to decide in the first instance when the rule we announce today relating to proceedings involving long-time resident aliens applies, and we wish to stress that the rule will not expand the scope of judicial review of agency determinations. The purpose of the rule is to impress upon the agency the grave nature of the task it performs. Although repeated attempts to redefine the term "beyond a reasonable doubt" may simply "aid the purposes of the tactician,"¹⁵ we are confident that the imposition of this requirement will have the salutary effect of causing the Board to proceed carefully in extreme

¹⁵ 9 Wigmore, *Evidence* §2497, at 320 (3d ed. 1940).

cases such as the case now before this court. All we can require is that the special inquiry officer and the Board conscientiously ask whether the facts on which the deportation of a long-term resident alien depends are almost certainly true. If these administrators do so proceed the scope of review will remain limited to an inquiry whether the final order of deportation is supported by reasonable, substantial, and probative evidence on the record considered as a whole.

Petitioner contends that we should go on to weigh the evidence against this higher standard and urges that in this light the evidence is insufficient to support a final order of deportation. We cannot agree. The requirement we have announced today is directed at the finder of facts, not the appellate court. Our only course is to dissolve the final [fol. 118] order of deportation and remand for further proceedings not inconsistent with this opinion.

Deportation order set aside and case remanded to Immigration and Naturalization Service.

FRIENDLY, *Circuit Judge* (dissenting):

Appealing as is my brothers' desire to ease the rigors of a statute that permits deportation twenty-five years after the cause,¹ I am unable to find the requisite authority on our part. Moreover, I fear that imposing a special judicially prescribed burden of persuasion on an ill-defined group of cases will introduce confusion and uncertainty into deportation law.

If the slate were clean, I might well agree that the standard of persuasion for deportation should be similar to that in denaturalization, where the Supreme Court has insisted that the evidence must be "clear, unequivocal, and convincing" and that the Government needs "more than a bare preponderance of the evidence" to prevail. *Schneiderman v. United States*, 320 U. S. 118, 125 (1943); *Chaunt v. United States*, 364 U. S. 350, 353 (1960). But here Con-

¹ It should not be forgotten that Congress has provided a method of relief for such cases, 8 U. S. C. §1254, which petitioner, for reasons best known to himself, has declined to pursue.

gress has spoken, most pertinently in §242(b) of the Immigration and Nationality Act of 1952, 8 U. S. C. §1252(b), where it directed the Attorney General to make regulations requiring that

“no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.”

[fol. 119] This provision overruled earlier indications that had been taken to recognize a lower quantum of proof as sufficient. See *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U. S. 103, 106 (1927) (“some evidence” sufficient to sustain deportation order against attack in habeas corpus); Note, *Developments in the Law—Immigration and Nationality*, 66 Harv. L. Rev. 643, 698 (1953); Gordon & Rosenfield, *Immigration Law and Procedure* §8.12c (1959). Standing alone, this direction to the Immigration Service to apply a higher standard than had previously been thought permissible might not preclude the courts from insisting on a still higher one in certain types of cases. But Congress made rather plain that, in raising the standard, it did not intend the courts to have liberty to effect further elevations. The House Report on the Immigration and Nationality Act, 2 U. S. Code Cong. & Ad. News (1952) 1653, 1712, stated:

“The requirement that the decision of the special inquiry officer shall be based on reasonable, substantial, and probative evidence means that, where the decision rests upon evidence of such a nature that it cannot be said that a reasonable person might not have reached the conclusion which was reached, the case may not be reversed because the judgment of the appellate body differs from that below.”

The intention thus expressed was enacted in 1961, 8 U. S. C. §1105(a)(4):

"Judicial Review of Orders of Deportation and Exclusion.

"[T]he Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive."

[fol. 120] The standard of "reasonable, substantial, and probative evidence" thus applies in all deportation cases—both to the Service and to the courts.

It is true that the substantial evidence rule itself is "quite malleable and permits wide variances in judicial practice." Gordon & Rosenfield, *supra*, at 857; see also 4 Davis, Administrative Law Treatise §29.02 at 126 (1958), and 1965 pocket part. But cf. *NLRB v. Walton Mfg. Co.*, 369 U. S. 404, 407 (1962). And the Supreme Court has spoken of the "solidity of proof that is required for a judgment entailing the consequences of deportation, particularly in the case of an old man who has lived in this country for forty years." *Rowoldt v. Perfetto*, 355 U. S. 115, 120 (1957). Granting all this, I perceive no proper basis under the statutory standard for reversing the order here under review; indeed, by remanding the case rather than setting the order aside, my brothers necessarily concede the evidence to have been sufficient even under the reasonable doubt standard they would apply.

If, as has been urged, deportation of a long-time resident should be treated as a penal sanction, my brothers' conclusion might indeed follow on constitutional grounds. But, as they recognize, an inferior court cannot take that step so long as *Bugajewitz v. Adams*, 228 U. S. 585, 591 (1913), *Harisiades v. Shaughnessy*, 342 U. S. 580, 594-95 (1952), *Galvan v. Press*, 347 U. S. 522 (1954), and other Supreme Court decisions remain the law.

I would deny the petition.

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[fol. 122]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH SHERMAN, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

Robert M. Morgenthau, United States Attorney for the
Southern District of New York, New York, N. Y.

OPINION EN BANC—January 17, 1966

Before Lumbard, Chief Judge, Waterman, Moore,
Friendly, Smith, Kaufman, Hays and Anderson, Circuit
Judges.

Petition to review a final order of deportation. Petition
denied.

The Immigration and Naturalization Service having
moved for rehearing in banc, and a majority of the
judges in regular active service having voted to re-
consider the case in banc and having given the parties
an opportunity to submit further briefs, upon con-
sideration by the court in banc the petition of Joseph
Sherman to review the order of the Service is denied,
for reasons stated in Judge Friendly's dissenting opin-
ion, 350 F 2d at 900. Judges Waterman and Smith dis-
sent and vote to grant the petition and set aside the
deportation order for reasons stated in Judge Water-
man's opinion, 350 F 2d 894.

/s/ Leonard P. Moore, Leonard P. Moore, Acting
Chief Judge.

17 January 1966

[fol. 123] [File endorsement omitted.]

[fol. 124]

IN THE UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Hon. Paul R. Hays, Hon. Robert P. Anderson, *Circuit Judges.*

JOSEPH SHERMAN, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

JUDGMENT—January 18, 1966

A petition for review of an order of the Immigration and Naturalization Service.

This cause came on to be heard on the administrative record of the Immigration and Naturalization Service.

On consideration whereof, it is now hereby ordered, adjudged and decreed that said petition be and it hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 125] [File endorsement omitted.]

[fol. 126] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 127]

SUPREME COURT OF THE UNITED STATES

No. 1090, October Term, 1965

JOSEPH SHERMAN, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE.

ORDER ALLOWING CERTIORARI—April 18, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.